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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C., U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, NEW YORK, AND DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, WASHINGTON, D.C.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below improperly exercised jurisdiction based upon an erroneous interpretation of the principles of administrative exhaustion, and as a result, exceeded its judicial review authority by creating, *sua sponte*, a novel interpretation of 5 U.S.C. 7114(a)(2)(B).

2. If it is found that the court below properly exercised jurisdiction, whether an Office of the Inspector General investigator is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-16a) is reported at 137 F.3d 683. The unpublished decision and order of the Federal Labor Relations Authority is set forth at App., *infra*, 19a-46a.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1998. (App., *infra*, 1a.) A petition for rehearing was denied on June 4, 1998. *Id.* at 17a. On August 18, 1998, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to November 2,

1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) are reproduced in the appendix. (App., *infra*, 47a-51a.)

STATEMENT

A. The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute (Statute) governs labor-management relations in the federal service. Under the Statute, the responsibilities of the Federal Labor Relations Authority (Authority) include adjudicating unfair labor practice complaints, negotiability disputes, and bargaining unit and representational election matters, and resolving exceptions to arbitration awards. See 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See BATF*, 464 U.S. at 92-93;

Federal/Postal/Retiree Coalition v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

The Statute makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "otherwise fail or refuse to comply with any provision" of the Statute. 5 U.S.C. 7116(a)(1) and (8). The instant case involves an unfair labor practice under section 7116(a)(1) and (8) and concerns the Authority's interpretation of its own organic statute—specifically, the representational right set forth in section 7114(a)(2)(B) of the Statute.

Section 7114(a)(2)(B) provides that an exclusive representative "shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2)(B). This statutory provision extends to federal employees the right to union representation provided in the private sector by the NLRB through its interpretation of the National Labor Relations Act and the Supreme Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*). *See* 124 Cong. Rec. 29,184 (1978), *reprinted in Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil*

Service Reform Act of 1978, at 926 (1979) (Congressman Udall explained that the House bill provisions that led to the enactment of section 7114(a)(2)(B) were intended to reflect the Supreme Court's decision in *Weingarten*); *Internal Revenue Serv., Wash., D.C.* v. *FLRA*, 671 F.2d 560, 563 (D.C. Cir. 1982) (same).

In the unfair labor practice context, the Authority decides an unfair labor practice case only if a party timely files exceptions to the decision and order of an Administrative Law Judge (ALJ). *See* 5 C.F.R. 2423.29(a) (1997).[1] If no exceptions are filed, the ALJ's "findings, conclusions, and recommendations" become "without precedential significance . . . the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto shall be deemed waived for all purposes." *Id.*

Authority decisions on unfair labor practices are subject to judicial review, pursuant to section 7123(a) and (b) of the Statute. 5 U.S.C. 7123(a), (b). The reviewing court "may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority." 5 U.S.C. 7123(c).

Section 7123(c) further provides, as relevant to the instant case, that "[n]o objection that has not been urged before the Authority, or its designees, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary

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[1]The Authority amended its unfair labor practice regulations effective October 1, 1997. Because this case arose under the prior unfair labor practice regulations, this citation to the Authority's regulations references the unfair labor practice regulations in effect prior to October 1, 1997. In any event, the relevant content of this provision was not changed. *See* 5 C.F.R. 2423.41(a) (1998).

circumstances." 5 U.S.C. 7123(c). In *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (*EEOC*), the Supreme Court explained that the purpose of this provision is to ensure "that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." Thus, if no exceptions have been filed with the Authority, the reviewing court does not have jurisdiction to consider the merits of the case on appeal unless it finds "extraordinary circumstances" justify such review. 5 U.S.C. 7123(c). *See EEOC*, 476 U.S. at 23.

In the instant case, the Department of Justice (DOJ), the Department of Justice Office of the Inspector General (DOJ-OIG), and the New York Immigration and Naturalization Service (NY-INS) (collectively "the agency"), did not file exceptions to the ALJ's decision and order. As such, the ALJ's decision and order, finding that the agency violated 5 U.S.C. 7114(a)(2)(B) and committed an unfair labor practice by denying bargaining unit employees representation at examinations conducted by agents of DOJ-OIG became, without precedential significance, the decision and order of the Authority. (App., *infra*, 20a.)

B. The Instant Case

1. Factual Background

This unfair labor practice case arose from the investigation of NY-INS employees by agents of DOJ-OIG. (App., *infra*, 22a-23a.) The case decided by the ALJ was a consolidation of five unfair labor practice complaints all alleging that the agency violated section 7116(a)(1) and (8) of the Statute based upon the failure of the agency to comply with section 7114(a)(2)(B) of the Statute. *Id.*

Three of the NY-INS employees interrogated by DOJ-OIG agents were employed as Immigration Inspectors at JFK International Airport, and the three other employees interrogated worked as Detention Enforcement Officers at the NY-INS Service Processing Center. *Id.* at 25a, 29a. In all cases, the employees requested and were denied union representation. *Id.* at 26a-29a, 30a-32a.

a. The Immigration Inspectors

The investigations of the three Immigration Inspectors occurred as a result of NY-INS management's suspicions of misconduct by these three employees. The suspected misconduct involved acceptance of bribes, assisting family members in immigration matters, misuse of the computer system, and involvement in an off-duty organization known as the "night riders." Because the U.S. Attorney's office had declined criminal prosecution, the investigations were administrative in nature. *Id.* at 26a.

DOJ-OIG's investigation of Immigration Inspector Mike Lixandroiu is illustrative of the nature of the interrogations. *See id.* at 26a-29a. Lixandroiu was given a direct order from the Assistant Area Port Director of NY-INS to meet with DOJ-OIG agents. *Id.* at 26a. Upon being given this order, Lixandroiu asked for union representation and his request was denied. Lixandroiu was then driven to the investigation, by a fellow Immigration Inspector, in a government vehicle. *Id.*

The DOJ-OIG agent informed Lixandroiu that the subject of the investigation was "administrative in nature" and involved allegations regarding abuse of authority and misconduct. *Id.* Further, he informed Lixandroiu that the report of investigation would be

provided to NY-INS for any action to be taken. *Id.* at 27a.

Lixandroiu again requested union representation and again the request was denied. He then stated that he intended to leave the investigation, but the DOJ-OIG agent told him that "the consequence of leaving the interrogation would be that he would be fired."[2] *Id.*

Finally, Lixandroiu was asked to sign notes summarizing the interrogation. *Id.* Lixandroiu requested union representation, and upon having that request denied refused to sign the notes. *Id.* at 27a. He was returned to work in a government vehicle. *Id.* at 27a-28a.

b. The Detention Enforcement Officers

The interrogation of the three Detention Enforcement Officers centered on the NY-INS District Director's policy against the ownership or possession of personal firearms. *Id.* at 30a. Employees who have violated that policy have been terminated from employment. *Id.*

The interrogation of Detention Enforcement Officer Sebastian Mason is illustrative of the DOJ-OIG investigations of these three employees. *See id.* at 30a-32a. Mason was given a direct order from his supervisor to meet with DOJ-OIG agents. Mason initially requested of the DOJ-OIG agents that he be allowed union representation. *Id.* at 30a. The agents said that he would have no need for union representation because

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[2]The procedure in this regard is that if an employee does not cooperate in a DOJ-OIG investigation, the DOJ-OIG agent contacts the employee's supervisor to inform him or her that the employee is not cooperating. The agent may then request that the supervisor direct the employee to answer the questions. Additional failure to cooperate can result in disciplinary action by NY-INS. *Id.*

he was being investigated for an administrative, not criminal, matter. *Id.*

The DOJ-OIG agents informed Mason that NY-INS initiated the investigation. As a result, the information was being gathered to be given to the NY-INS District Director. According to the OIG agents, based upon the information provided the District Director would decide whether disciplinary action was warranted. *Id.* at 31a.

2. The ALJ's Decision and the Authority's Adoption Thereof

Based upon these facts and his application of the relevant Authority case law to the facts of this case, the ALJ issued a recommended decision in which he concluded that DOJ, DOJ-OIG, and NY-INS committed an unfair labor practice in violation of section 7116(a)(1) and (8) by failing to comply with section 7114(a)(2)(B) of the Statute. *Id.* at 35a-37a. Specifically, he found that the agency improperly denied the bargaining unit employees representation at DOJ-OIG examinations from which the employees reasonably feared disciplinary action might result. *Id.*

The ALJ made this determination in accordance with the Authority's decision in *Headquarters, National Aeronautics and Space Administration, Washington, D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C.*, 50 FLRA 601 (1995) (*HQ NASA*). (App., *infra*, 35a.) In *HQ NASA*, the Authority determined that an Office of the Inspector General (OIG) investigator is a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. *See* 50 FLRA at 614. Thus, under *HQ NASA*, when questioned by an OIG agent, a bargaining unit employee who reasonably fears that discipline may

result from the examination and who requests representation is entitled to union representation under section 7114(a)(2)(B).[3]

In finding in this case that the Statute was violated, the ALJ specifically assigned liability to DOJ, DOJ-OIG, and NY-INS. (App., *infra*, 35a-37a.) A unique aspect of this liability determination is the finding that the agency component, NY-INS, as well as the parent agency, DOJ, and its OIG, committed an unfair labor practice. *Id.* at 36a-37a. In *HQ NASA*, for example, the Authority found that the parent agency, the Headquarters of the National Aeronautics and Space Administration, and its OIG were liable for the unfair labor practice, but not the agency component. *See* 50 FLRA at 620.

With regard to NY-INS, the ALJ explained that the record in the case "shows more involvement by the component agency in the OIG investigation" and that NY-INS "was an active participant in the OIG examination and, in fact played a pivotal role." (App., *infra*, 37a.) Because of NY-INS's active participation in denying the bargaining unit employees their statutory rights under section 7114(a)(2)(B), the ALJ concluded that NY-INS also committed the unfair labor practice. *Id.*

The agency did not file exceptions to the ALJ's decision and order, and as noted at p. 5 *supra*, the ALJ's decision and order became the nonprecedential decision and order of the Authority. *Id.* at 20a. The agency was then obligated to comply with the Authority's order—

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[3]The Eleventh Circuit enforced this Authority decision in *National Aeronautics and Space Administration, Headquarters, Washington, D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C.* v *FLRA*, 120 F.3d 1208 (11th Cir. 1997) (NASA), *petition for cert. filed*, 67 U.S.L.W. 3170 (U.S. Aug. 28, 1998) (No. 98-369).

that is, to cease and desist from the unfair labor practice and to take appropriate affirmative action. The agency refused to comply with the Authority's order.

3. The Second Circuit's Decision

The Authority applied to the United States Court of Appeals for the Second Circuit for summary entry of a judgment enforcing its order against the agency. The Authority asserted that pursuant to the administrative exhaustion provision in section 7123(c) of the Statute, the agency had waived all objections to the order, that there were no contestable issues before the court, and that the Authority was entitled to summary enforcement of its order.

The Second Circuit denied enforcement.[4] (App., *infra*, 3a.) In the decision, the court first determined that it had jurisdiction to consider the merits of the Authority's decision based upon the extraordinary circumstances exception to section 7123(c). *Id.* at 7a. Relying upon its decision in *Overseas Education Association, Inc.* v. *FLRA*, 961 F.2d 36, 38 (2d Cir. 1992) (*OEA*), the court found that it would have been futile for the agency to file exceptions because the Authority "has previously made clear its position that section 7114(a)(2)(B) applies to questioning by OIG agents." (App., *infra*, 7a-8a.) The court further found that based upon the D.C. Circuit's decision in *FLRA* v. *United States Department of Commerce*, 962 F.2d 1055, 1057-59 (D.C. Cir. 1992) (*Commerce*), it could, in considering the

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[4]The decision under review is the final decision of the Second Circuit, which was issued after the court granted in part the Authority's petition for rehearing. (App., *infra*, 1a.) The initial decision, superseded by this decision, is reported at 125 F.3d 106 (2d Cir. 1997).

Authority's enforcement petition, review the "respondent's otherwise available contentions" despite the respondent's failure to timely file a petition for review of the Authority's order. (App., *infra*, 8a.)

In its consideration of the merits of the decision regarding section 7114(a)(2)(B), the court focused on two subissues: "(a) what entity is the pertinent 'agency' and (b) is an OIG agent a 'representative' of the pertinent 'agency.'" *Id.* at 9a. On the question of what entity is the "agency," the court analyzed the language of the Statute and the other court of appeals' decisions on the application of section 7114(a)(2)(B) to OIGs: *United States Department of Justice* v. *FLRA*, 39 F.3d 361, 365 (D.C. Cir. 1994) (*DOJ*); *Defense Criminal Investigative Service, Department of Defense* v. *FLRA*, 855 F.2d 93, 98 (3d Cir. 1988) (*DCIS*); and *NASA*, 120 F.3d at 1213. (App., *infra*, 10a.) The court then held, in agreement with the Third and Eleventh Circuits, that the appropriate "agency" under section 7114(a)(2)(B) properly includes the "parent agency employing the interrogated employees (here, the DOJ)." *Id.* at 10a-11a.

On the issue of whether an OIG agent is a "representative of the agency" within the meaning of section 7114(a)(2)(B), the Second Circuit rendered a determination that conflicts with the decisions of the Authority on the issue, as well as the decisions of the three circuits that have decided the issue. In so doing, the court invented its own test for whether a DOJ-OIG agent is a "representative of the agency." *See id.* at 13a-14a

According to the Second Circuit,"[s]o long as the OIG agent is questioning an employee for bona fide purposes

within the authority of the [Inspector General Act][5] and not merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff . . . the OIG agent is not a 'representative' of the employee's agency for purposes of section 7114(a)(2)(B)." *Id.* at 14a. The court made this determination based upon its conclusion that "[s]ubjecting all OIG interrogations of federal employees to all aspects of [the Statute's] protections would risk impairing the 'independent' investigations that OIGs were created to conduct." *Id.* at 13a.

Having developed its own test for application of section 7114(a)(2)(B), the court proceeded to apply the test to the facts of the case. Because the court found that the investigations involved "matters within the scope of bona fide functions of the [Inspector General Act]," it concluded that section 7114(a)(2)(B) was not applicable to the interrogations of the bargaining unit employees. *Id.* at 15a. Therefore, the court denied enforcement of the Authority's order determining that the agency had committed an unfair labor practice. *Id.* at 16a.[6]

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision demonstrates a disregard for basic principles of administrative exhaustion in a case involving an issue of great importance to federal labor relations on which there is an acknowledged conflict in the circuits: pursuant to 5 U.S.C. 7114(a)(2)(B), the entitlement of an exclusive

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[5]The statutory scheme governing OIGs is set forth in the Inspector General Act of 1978, 5 U.S.C. App. 3 sections 1-12 (1994 & Supp. II 1996) (Inspector General Act).

[6]The Authority filed a second petition for rehearing, which the court denied on June 4, 1998. *Id.* at 17a.

representative of federal employees to be present, upon a bargaining unit employee's request, when the employee is examined by an OIG agent. The agency's failure to file exceptions resulted in no Authority consideration of this case. Despite the Statute's direction in section 7123(c) that "[n]o objection that has not been urged before the Authority . . . shall be considered by the court," the Second Circuit nevertheless found that it had jurisdiction to consider the case. Further, the court wrongly encroached upon the Authority's administrative duties by, *sua sponte*, establishing a novel standard for section 7114(a)(2)(B) rights without there having been any consideration of this standard by the Authority. As a result of these improprieties, the court issued an erroneous decision on the section 7114(a)(2)(B) issue that conflicts with other circuit decisions and thus warrants review by this Court.

A. The Decision of the Court Below Conflicts with the Principles of Administrative Exhaustion

1. The Second Circuit Disregarded the Administrative Exhaustion Requirement of Section 7123(c)

The agency's failure to file exceptions resulted in no Authority consideration of this case. Nevertheless, the Second Circuit excused the agency's failure to file based upon the "extraordinary circumstance" of futility and, in the process, flouted section 7123(c)'s administrative exhaustion requirement. (App., *infra*, 7a-8a.)

This Court has considered the section 7123(c) exhaustion requirement and concluded that "under

§ 7123(c) review of 'issues that an agency never placed before the Authority' is barred absent extraordinary circumstances." *EEOC*, 476 U.S. at 23 (quoting *Department of Treasury* v. *FLRA*, 707 F.2d 574, 579 (D.C. Cir. 1983)). The Court explained that "[s]ection 7123(c) speaks to courts, not parties, and its plain language evinces an intent that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." *Id.*

"Where Congress specifically mandates" administrative exhaustion prior to judicial review, as in section 7123(c), this Court has recognized that "exhaustion is required." *McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992) (*McCarthy*). The reason for this requirement is that "it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Id.* at 145.

The "exhaustion principles apply with special force when 'frequent and deliberate flouting of administrative processes' could weaken an agency's effectiveness by encouraging disregard of its procedures." *Id.* (quoting *McKart* v. *United States*, 395 U.S. 185, 195 (1969) (*McKart*)); *see also McGee* v. *United States*, 402 U.S. 479, 484 (1971). The Second Circuit's decision in this case encourages such disregard of the Authority's procedures, and therefore should be reviewed by this Court.

The court below expressly recognized the "cavalier manner" in which the agency approached this case. (App., *infra*, 6a.) The agency did not file exceptions with the Authority; did not petition the court for review within sixty days as provided in section 7123(a) of the Statute; and waited for the Authority to seek summary enforcement in the court before raising any arguments

in opposition to the ALJ's decision. *Id.* at 6a-7a. Despite recognizing that the agency (the Department of Justice) would oppose such arrogance by a private litigant and that it risked "forfeiting its position on the merits," the court nevertheless found that it had jurisdiction to consider the merits of the case based upon two factors: 1) the extraordinary circumstance of futility; and 2) the D.C. Circuit's ruling in *Commerce*, 962 F.2d at 1057-59. *Id.* at 7a-8a. The court's errors in relying on these two factors are discussed below.

2. The Second Circuit's Futility Determination Is Flawed

"Futility should not lightly be presumed," as the D.C. Circuit observed based upon its analysis of this Court's decision in *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (*L.A. Tucker*). *Washington Ass'n for Tel. and Children* v. *Federal Communications Comm'n*, 712 F.2d 677, 682 n.9 (D.C. Cir. 1983). This Court stated in *L.A. Tucker* that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." 344 U.S. at 37. This requirement holds even when it is argued that the administrative agency "had a predetermined policy on [the relevant] subject which would have required it to overrule the objection if made," because repetition of an objection could lead to a change of policy by the agency. *Id.* Thus, "[s]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.*

The Second Circuit attempted to distinguish *L.A. Tucker* from the instant case, describing this Court's administrative exhaustion reasoning as a broad general rule that applied to a "technical objection . . . totally unrelated to the merits." (App., *infra*, 7a n.5.) The court then stated that its decision regarding the futility exception to section 7123(c) in *OEA*, 961 F.2d at 38—the case upon which it relied in finding futility in this case—was not affected by *L.A. Tucker*. *Id.*

The Second Circuit's overly indulgent interpretation and application of the futility exception conflicts not only with the *L.A. Tucker* language set out above, but also with other circuits' restrictive views of administrative exhaustion and the futility exception. The D.C. Circuit, for example, recognizes that futility can serve as an exceptional circumstance (or "extraordinary" circumstance under section 7123(c)'s language) "where 'an agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider.'" *UDC Chairs Chapter, Am. Ass'n of Univ. Professors* v. *Board of Trustees of the Dist. of Columbia*, 56 F.3d 1469, 1475 (D.C. Cir. 1995) (quoting *Randolph-Sheppard Vendors of Am.* v. *Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986)). In contrast to the Second Circuit, however, in applying the futility exception the D.C. Circuit requires "'the certainty of an adverse decision' or indications that pursuit of administrative remedies would be 'clearly useless.'" *Id.*[7]

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[7]Other courts maintain similar views. *See, e.g., Diaz* v. *United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1485 (9th Cir. 1995) ("bare assertions of futility are insufficient to bring a claim within the futility exception, which is designed to avoid the need to pursue an administrative review that is demonstrably doomed to fail"); *Thetford Properties* v. *U.S. Dep't of Housing &*

Even the Second Circuit in *OEA* excused the failure to exhaust administrative remedies based on futility only because of the Authority's "deeply rooted and well-documented acceptance of the excessive interference test"—a test used by the Authority to determine the negotiability of certain bargaining proposals. 961 F.2d at 38. The court noted in *OEA* that it would have been hopeless for the union to challenge "so formidable a wall of precedent." *Id.* at 38.

In the instant case, however, there is no such demonstration of a "deeply rooted and well-documented acceptance" of the Authority's holding regarding OIGs and section 7114(a)(2)(B). Although the court below found sufficient similarities between the Authority's relevant precedent in *OEA* and this case, the Authority's extensive precedent on the "excessive interference" test at the time *OEA* was decided is significantly different from the minimal precedent on whether section 7114(a)(2)(B) applies to OIG investigations. When the Second Circuit reviewed the "excessive interference" test in *OEA*, the test had been used by the Authority for six years and had been affirmed by the courts of appeals that reviewed it. *See OEA*, 961 F.2d at 38. The *HQ NASA* test, on the other hand, is not so "deeply rooted" and well-accepted. When the instant case was decided, the *HQ NASA*

Urban Dev., 907 F.2d 445, 450 (4th Cir. 1990) ("Absent a clear showing that an administrative agency has taken a hard and fast position that makes an adverse ruling a certainty, a litigant's prognostication that he is likely to fail before an agency is not a sufficient reason to excuse the lack of exhaustion."); *Springer* v. *Wal-Mart Assocs. Group Health Plan*, 908 F.2d 897, 901 (11th Cir. 1990) ("'bare allegations of futility are no substitute for the "clear and positive" showing of futility . . . required before suspending the exhaustion requirement'") (quoting *Makar* v. *Health Care Corp.*, 872 F.2d 80, 83 (4th Cir. 1989)).

decision was only two years old, and a circuit split existed regarding the application of section 7114(a)(2)(B) to OIG investigations.

The circuit split on the issue alone makes it difficult to justify application of the futility exception to a case involving this section 7114(a)(2)(B) issue. Further, it should be noted that there are at least two elements of this section 7114(a)(2)(B) case that the Authority has never had the opportunity to consider.

First, the Second Circuit focused particularly on the "criminal" nature of the allegations being investigated by the DOJ-OIG agents. In that connection, the court compared an FBI investigation of a criminal matter, where the section 7114(a)(2)(B) right would not apply, to the OIG investigations of the "criminal" allegations in this case. (App., *infra*, 14a.) But the futility of filing exceptions with the Authority, concerning this aspect of the court's decision, is difficult to discern given the Authority's statement in *HQ NASA:*

> Our decision herein should not be construed as suggesting that we would conclude in all circumstances that every employee of each subcomponent of agencies having government-wide, law-enforcement responsibilities, such as the Department of Justice, is a "representative of the agency" for the purposes of section 7114(a)(2)(B). Such cases might well be distinguished in light of statutory responsibilities extending outside of the parent agency, as contrasted with the OIG's jurisdiction and its actions in this case, which are focused on internal agency matters.

HQ NASA, 50 FLRA at 616 n.13.

Second, the ALJ found liability on the part of the

agency component, NY-INS, in this case. (App., *infra*, 37a.) The Authority, however, has not held a component of the agency liable for a section 7114(a)(2)(B) violation by an OIG. *See id.* at 36a; *HQ NASA*, 50 FLRA at 621-22. As such, the Authority has no "deeply rooted and well-documented" position on this question; in fact, the Authority has not even addressed the issue. Accordingly, it cannot be assumed that it would have been futile for the agency to have filed exceptions with the Authority.

In this case, the Second Circuit found the rare exception of futility based only on the court's previous decision in *OEA*, and its recognition of two Authority decisions in which "the Authority has previously made clear its position" that OIG agents are subject to section 7114(a)(2)(B). (App., *infra*, 7a-8a.). With no additional analysis, the court concluded it would have been futile for the agency to file exceptions. Given the strict standards for finding extraordinary circumstances and the unconvincing grounds for the futility exception's application in this case, the Second Circuit erred and the decision merits review.

3. The Second Circuit Erred by Relying on *Commerce*

The court's decision is further flawed because of its reliance on the D.C. Circuit's *Commerce* decision in finding jurisdiction in this case. In *Commerce*, the D.C. Circuit ruled that it had jurisdiction in an enforcement proceeding to consider the merits arguments of the agency, notwithstanding the fact that the agency did not timely petition for judicial review. *See* 962 F.2d at 1059. The procedural circumstances of the *Commerce* case differ from this case and render *Commerce* inapplicable.

The jurisdictional issue in *Commerce* concerned timeliness. Unlike the instant case, in *Commerce* the agency filed exceptions with the Authority, and the Authority had the opportunity to fully consider the case. *See id.* at 1057. Thus, the only jurisdictional consideration before the D.C. Circuit was whether the 60-day time limit for filing a petition for review in section 7123(a) barred the agency from arguing its position on the merits in an Authority enforcement proceeding under section 7123(b).[8] *See id.* at 1058.

The instant case, by contrast, involves both the previously discussed administrative exhaustion jurisdictional issue and a timeliness jurisdictional issue based upon the agency's failure to seek judicial review within 60 days as provided for in section 7123(a). Not only did the court excuse the agency's failure to file exceptions with the Authority in contravention of the section 7123(c) exhaustion requirements, but it also excused the fact that the agency ignored the judicial review provisions of section 7123(a).

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[8]The Authority maintains that *Commerce* was wrongly decided. As the Authority argued to the D.C. Circuit in *Commerce*, the 60-day judicial review filing requirement of section 7123(a) indicates that Congress intended to impart finality into the Authority's proceedings. *See Commerce*, 962 F.2d at 1058; 5 U.S.C. 7123(a). The *Commerce* decision's interpretation of section 7123(a) thwarts that congressional intention by allowing parties to neither comply with Authority orders nor seek timely review, and yet remain able to present their arguments on the merits of cases to the courts when the Authority initiates enforcement proceedings. *See* 962 F.2d at 1058. *Commerce* thus improperly renders meaningless the Statute's 60-day time limit for filing a petition for review. *See Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *Tobey* v. *NLRB*, 40 F.3d 469, 471 (D.C. Cir. 1994) ("A fundamental principle of statutory construction mandates that we read statutes so as to render all of their provisions meaningful.").

The Second Circuit's disregard for administrative law principles in this case suggests to parties that they need not file exceptions in cases where the Authority has established precedent on a particular issue and that they also need not file a petition for review within 60 days as required under section 7123(a). In the process, the Second Circuit has ignored this Court's repeated warning that "exhaustion principles apply with special force when 'frequent and deliberate flouting of administrative processes' could weaken an agency's effectiveness by encouraging disregard of its procedures." *McCarthy*, 503 U.S. at 145 (quoting *McKart*, 395 U.S. at 195). This case, if not reversed by this Court, could weaken the Authority's effectiveness, and that of other administrative agencies, by encouraging disregard both of proper administrative review procedures and of proper judicial review procedures.

4. The Second Circuit Exceeded Its Judicial Review Authority by Establishing Its Own Section 7114(a)(2)(B) Standard

In issuing this decision, the Second Circuit also exceeded its authority and "impermissibly encroached upon the [Authority's] function in determining for itself" the employee's right to representation in an investigatory interview. *Weingarten*, 420 U.S. at 266. The court's creation of a completely new standard for section 7114(a)(2)(B) rights, without careful analysis of Authority precedent or without remand to the Authority, was improper. Moreover, in so acting the court established erroneous law concerning this representation right for federal sector bargaining unit employees.

"It is well established that an agency's action must be upheld, *if at all*, on the basis articulated by the agency

itself." *Motor Vehicle Mfrs. Ass'n of the United States* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (emphasis added). Further, "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). *See also NLRB* v. *Enterprise Assoc. of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & Gen'l Pipefitters of N.Y.*, 429 U.S. 507, 522 n.9 (1977) (if court finds agency made error of law, court may correct the error of law but is obligated "'to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law'") (quoting *ICC* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)).

Under any analysis, the course taken by the Second Circuit was inappropriate. Although the court had the authority to "make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority," 5 U.S.C. 7123(c), it did not have the authority to, *sua sponte*, create its own interpretation of section 7114(a)(2)(B) of the Statute.

In a case with a similar scenario, *Federal Trade Commission* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972) (*FTC*), this Court found that the appellate court could not interpret a statutory provision of the Federal Trade Commission (Commission), but that it could "only affirm or vacate an agency's judgment to that effect." *Id.* at 249. The Court explained, as it had set forth in *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery*), that the reason

courts cannot substitute their discretion for the administrative agency's is "to avoid propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." *FTC*, 405 U.S. at 249 (internal quotation marks and citations omitted). Therefore, the Court found that rather than establishing its own construction of the statute, the appropriate course "would have been to remand the case to the Commission for further proceedings." *Id.* at 250.

This Court followed the same course with regard to the Authority in *Department of Treasury, Internal Revenue Serv.* v. *FLRA*, 494 U.S. 922 (1990). The Court did not agree with the Authority's interpretation of the relevant statutory provisions, but rather than creating its own interpretation it charged the Authority with "giv[ing] reasonable content to the statute's textual ambiguities." *Id.* at 933. Citing *Chenery*, the Court noted that such interpretation "is not a task we ought to undertake on the agency's behalf in reviewing its orders." *Id.*

By contrast, the Second Circuit mistakenly took it upon itself to interpret section 7114(a)(2)(B), without any Authority consideration of the case or the standard announced by the court.[9] The court thus exceeded its judicial responsibilities and infringed upon the Authority's responsibilities. For this reason, as well, this case merits Court review.

B. The Second Circuit's Interpretation of Section 7114(a)(2)(B) Conflicts with Other Circuit Decisions on this Issue and Is Erroneous

Four courts have considered whether an OIG

[9]It should also be noted that the court adopted a standard that was not urged by any of the parties.

investigator is a "representative of the agency" within the meaning of section 7114(a)(2)(B),[10] and three distinct standards have resulted. The Authority asserts that this circuit split necessitates Supreme Court review in order for there to be a comprehensive resolution of the current uncertainty regarding application of section 7114(a)(2)(B) to OIG investigations.

The Eleventh Circuit, in *NASA*, 120 F.3d at 1213, and the Third Circuit, in *DCIS*, 855 F.2d at 100, both affirmed the Authority's conclusion that an OIG agent is a "representative of the agency." In contrast, the D.C. Circuit in its *DOJ* decision rejected the Authority's holding and concluded that an OIG agent is not a "representative of the agency." 39 F.3d at 368. The Second Circuit's determination on this issue falls somewhere between *DOJ* and the positions of the Third and Eleventh Circuit. (App., *infra*, 13a.)

In response to the petition for a writ of certiorari filed in *NASA*, the Authority submitted a memorandum in support of the petition. As argued in that memorandum, the Authority maintains that *NASA* was correctly decided, but because of the current confusion among federal employees, labor unions, and agencies regarding application of section 7114(a)(2)(B) to OIG investigations, this issue is appropriate for review. (*See* Memorandum for the FLRA at 13-15, No. 98-369.)

The instant case also merits review by this Court because it erroneously interprets section 7114(a)(2)(B), and because even if *NASA* is reviewed by this Court, the significant differences in the Second and Eleventh

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[10]Along with the instant case, the three other decisions are the Third Circuit's *DCIS* decision, 855 F.2d 93; the D.C. Circuit's *DOJ* decision, 39 F.3d 361; and the Eleventh Circuit's *NASA* decision, 120 F.3d 1208.

Circuits' resolution of the questions considered could result in a Supreme Court decision that would not fully address and resolve the holding of the Second Circuit. Thus the ultimate goal of complete resolution of the current uncertainty regarding the application of section 7114(a)(2)(B) to OIG investigations would be unfulfilled.

In this connection, two aspects of the Second Circuit's resolution of the section 7114(a)(2)(B) issue are particularly troubling because of the confusing nature of the test created and applied by the court. First, the court's test, focusing on the context in which the investigation arises, creates practical application problems. The court explained that the OIG is not a "representative of the agency" if "questioning an employee for bona fide purposes" of the Inspector General Act, but also conceded that there may be instances when an OIG investigator would be a "representative of the agency." (App., *infra*, 13a-14a.) This acknowledgment by the court means that circumstances will arise where the parties will be unsure of their respective rights and obligations in this respect.

Second, the court's reliance upon the criminal aspect of the matter being investigated is problematic because of the difficulty with making a valid and reliable distinction between "criminal" and "administrative" matters. In applying its own newly created test, the Second Circuit concluded that the OIG agents were not "representatives of the agency" because these investigations involved "serious criminal offenses." *Id.* at 15a. This was significant to the court despite the fact that, as the ALJ noted, the interrogations of the three Immigration Inspectors, for example, were not criminal but rather were specifically "of an administrative nature, since the U.S. Attorney's office had declined criminal prosecution." *Id.* at 26a.

Virtually any workplace matter being investigated involves conduct that could be characterized as a crime. An altercation between two employees could be criminal assault; inventory shortages could be larceny or embezzlement. In fact, the employee interviewed in the *Weingarten* case was suspected of theft. 420 U.S. at 254-55. Therefore, it will be difficult to distinguish between "criminal" and "administrative" matters. The difficulty the parties will face in the application of the Second Circuit's decision further demonstrates the need for Supreme Court review of this issue and this case.

CONCLUSION

The petition for a writ of certiorari should be granted.[11]

Respectfully submitted,

DAVID M. SMITH*
Solicitor

ANN M. BOEHM
Attorney

* Counsel of Record

OCTOBER 1998

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[11]The Solicitor General authorizes the filing of this petition.

APPENDIX A

FEDERAL LABOR RELATIONS AUTHORITY,
Petitioner,

v.

U.S. DEPARTMENT OF JUSTICE, Washington, D.C.,
U.S. DEPARTMENT OF JUSTICE, Immigration and Naturalization Service, New York District, New York,
and
DEPARTMENT OF JUSTICE, Office of the Inspector General, Washington, D.C., *Respondents.*

Docket No. 97–4001.

U.S. Court of Appeals,
Second Circuit.

Argued Feb. 18, 1997.

Finally Submitted March 20, 1997.

Decided Sept. 25, 1997.

Modified on Petition for Rehearing
Feb. 5, 1998.

David M. Smith, Solicitor, Washington, DC (William R. Tobey, Deputy Solicitor, Ann M. Boehm, Federal Labor Relations Authority, Washington, DC, on the brief), for petitioner.

Howard S. Scher, Dept. of Justice, Washington, DC (Frank W. Hunger, Asst. Atty. Gen., William Kanter, Dept. of Justice, Washington, DC, on the brief), for respondents.

Before: NEWMAN KEARSE and FRIEDMAN,* Circuit Judges.

JON O. NEWMAN, Circuit Judge:

This application to enforce an order of the Federal Labor Relations Authority ("FLRA" or the "Authority") concerns the Federal Labor-Management Relations Act ("FLMRA"),[1] 5 U.S.C. §§ 7101-7135 (1994). The issue presented is whether the FLRA correctly ruled that the Office of the Inspector General ("OIG") of the United States Department of Justice ("DOJ") committed an unfair labor practice in violation of the FLMRA by refusing the request of employees of the New York office of the Immigration and Naturalization Service ("INS-NY") to have a union representative present during questioning by OIG agents. The application also presents the preliminary issue of whether the authority of the FLRA to apply the FLMRA to interrogation by OIG agents may be challenged in this enforcement proceeding even though such a challenge was not made before the FLRA after an adverse ruling by an Administrative Law Judge ("ALJ").

These issues arise on the FLRA's application to enforce its July 30, 1996, order determining that unfair labor practices were committed by the OIG, the DOJ, and the INS-NY. We conclude that the FLRA lacks authority to require an Inspector General to permit federal employees to have a union representative present during questioning except in those rare instances where an OIG agent is conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibilities and not

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*The Honorable Daniel M. Friedman of the United States Court of Appeals for the Federal Circuit, sitting by designation.

[1]The FLMRA is sometimes referred to as the Federal Service Labor-Management Relations Statute or "FSLMRS."

interrogating for bona fide purposes within the authority of an Inspector General. We also conclude that we have jurisdiction to make that ruling in this proceeding. We therefore deny the application for enforcement.

Background

In November 1994 and January 1995, special agents of the OIG of the DOJ sought to question three INS inspectors working at John F. Kennedy International Airport concerning various matters, including an allegation of accepting bribes. In August 1995, OIG agents sought to question three detention officers working at the INS Processing Center in New York City concerning alleged violations of the INS District Director's policy prohibiting detention enforcement officers from purchasing or carrying personal firearms. Some of the INS officers ordered to report for questioning requested union representation at their interrogations. The OIG agents rejected these requests.

The employees' union filed unfair labor practice ("ULP") charges, and the Boston Region of the FLRA issued a notice of complaints and a notice of hearings, alleging that OIG, DOJ, and INS-NY has committed ULPs. After a consolidated hearing, an ALJ found that the OIG had committed a ULP by prohibiting the attendance of a union representative during questioning of employees. *See U.S. Department of Justice et al.*, 1996 WL 560250, at *1 (F.L.R.A. July 30, 1996) ("*DOJ-INS-NY*"). The ALJ also found that the DOJ had committed a ULP by failing to exercise its supervisory authority over the OIG, and that the INS-NY had committed a ULP by failing to inform its employees that they could insist on the attendance of a union representative. The ALJ ordered the three respondents to cease and desist from denying INS employees their right to union

representation during interrogation by OIG agents, and also ordered various forms of affirmative relief.

The respondents did not file exceptions with the FLRA. As a result, on July 30, 1996, the FLRA entered an order adopting the ALJ's findings, conclusions, and decision and order. *See id.*; 5 C.F.R. § 2423.29(a) (1997). Thereafter, the FLRA applied to this Court for enforcement of its July 30, 1996, order. After consideration of the respondents' answer to the application, which contested the FLRA's jurisdiction to issue the order, we requested and received briefs from the parties.

Discussion

I. Statutory Framework

The FLMRA provides generally for collective bargaining between federal agencies and elected representatives of appropriate units of such agencies. *See* 5 U.S.C. §§ 7111-7114. Excluded from the definition of an "appropriate" unit is one that includes

> any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honesty and with integrity.

Id. § 7112(b)(7).[2] Employees of the OIG are within this exclusion and therefore cannot be members of an

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[2]The structure of this provision unfortunately creates a slight ambiguity concerning the referent of the pronoun "whose." Normally, a referent is the closest preceding noun. *See Oneida Indian Nation* v. *New York*, 860 F.2d 1145, 1167 (2d Cir. 1988). However, the pronoun in this instance likely refers to people, and reading the referent to be

appropriate collective bargaining unit. The parties do not appear to dispute that OIG employees are excluded from collective bargaining, though, as we discuss below, they disagree on whether the exclusion of OIG employees from collective bargaining on their own behalf renders them exempt from certain provisions that guarantee protections to other employees who are subject to collective bargaining.

Among the rights accorded a labor organization that has been recognized as the exclusive representative of the employees of an appropriate unit is the right to be represented at "any examination of an employee in the unit by a *representative of the agency*" if the employee "reasonably believes that the examination may result in disciplinary action against the employee" and requests representation. *Id.* § 7114(a)(2)(B) (emphasis added).[3] This protection is the so-called *Weingarten* provision of

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"agency" would make no sense. If the referent of "whose" is the next closest preceding noun, "individuals," the provision would exclude only an employee investigating those individuals whose duties affect the internal security of the agency, an unlikely category to be identified. A more reasonable interpretation is that the referent of "whose" is "employee," which means that the provision excludes any employee (a) who is primarily engaged in investigating agency employees and (b) whose duties directly affect the internal security of the agency.

[3]The FLMRA provides:

> (a)(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> . . .
>
> (B) any examination of an employee in the unit by a epresentative of the agency in connection with an investigation if—
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.
>
> 5 U.S.C. § 7114(a)(2)(B).

the FLMRA, paralleling a right of private sector employees guaranteed by section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1994). *See NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975) (upholding NLRB's interpretation of section 7). An agency's denial of the rights protected by the FLMRA is an unfair labor practice, 5 U.S.C. § 7116(a), which may be remedied by the FLRA, *id.* § 7118.

II. Jurisdiction

The FLRA contends that this Court lacks jurisdiction to consider the respondents' contention that agents of the OIG are not "representatives of the agency" within the meaning of section 7114(a)(2)(B) because no exceptions to the ruling of the ALJ were made before the FLRA. It relies on 5 U.S.C. § 7123(c):

> No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances.

The respondents reply that exceptional circumstances are present in that the FLRA's prior rulings with respect to questioning by OIG agents rendered futile any attempt to persuade the Authority that OIG agents are not "representatives of the agency" within the meaning of section 7114(a)(2)(B).

In considering these contentions, we note that the Department of Justice, which is normally quick to assert that private litigants have forfeited their claims on the merits for lack of exhaustion before administrative agencies, has approached this proceeding in a somewhat cavalier manner. First, the DOJ elected not to file with the Authority exceptions to the ALJ's ruling, thereby letting that ruling become the Authority's final decision.

Then, the DOJ elected not to pursue its statutory opportunity to petition this Court for review of the Authority's ruling within 60 days. *See* 5 U.S.C. § 7123(a). Instead, the DOJ waited until the FLRA brought this enforcement proceeding, more than five months after the Authority's July 30, 1996, final decision,[4] and only now asserts its opposition to that decision.

Though the DOJ's tactic is both at variance with what it normally demands of private litigants when it has prevailed on he merits, and also entailed the risk of forfeiting its position on the merits, we conclude, with no enthusiasm, that we have jurisdiction to consider the merits. First, we have previously ruled that the "extraordinary circumstances" exception to section 7123(c) excuses a litigant from presenting an issue to the FLRA where doing so would be futile.[5] *See Overseas Education Association, Inc.* v. *FLRA*, 961 F.2d 36, 38 (2d Cir. 1992). The FLRA has previously made clear its position that section 7114(a)(2)(B) applies to questioning by OIG agents, on the theory that OIG agents are "representatives" of the DOJ, which the FLRA regards

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[4]The FLMRA sets no time limit for the Authority's enforcement petition. *See* 5 U.S.C. § 7123(b); *cf. Buchanan* v. *NLRB*, 597 F.2d 388, 392 (4th Cir. 1979) (no precise time limit for petition to enforce NLRB order).

[5]In permitting a merits contention, previously rejected by an agency, to be contested in this Court despite lack of presentation to the agency, we have not overlooked the Supreme Court's decision in *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952). Though the Court used rather broad language to assert that presentation of contentions to the agency is required "as a general rule" in order to obtain judicial review, that case involved a technical objection (defect in the manner of appointing a hearing examiner) totally unrelated to the merits. We do not understand that decision to have eliminated the "futility" doctrine, which we invoked in *Overseas Education Association, Inc.* v. *FLRA*, 961 F.2d 36, 38 (2d Cir. 1992).

as the "agency" for purposes of the *Weingarten* provision. *See United States Department of Justice Office of the Inspector General Washington, D.C., et al.*, 47 F.L.R.A. 1254, 1261 (F.L.R.A. 1993); *see also Headquarters National Aeronautics and Space Administration Washington, D.C., et al.*, 50 F.L.R.A. 601, 612 (F.L.R.A. 1995) ("*NASA*") ("The Authority has *long held* that an OIG investigator can, under certain circumstances, be a 'representative of the agency' within the meaning of section 7114(a)(2)(B) of the [FLMRA].") (emphasis added), *petition for enforcement granted sub nom. FLRA* v. *National Aeronautics and Space Administration*, 120 F.3d 1208 (11th Cir. 1997) ("*FLRA/NASA*"). The respondents were not required to urge the FLRA to abandon this fully considered position.

Second, even though the respondents declined to petition for review, we have jurisdiction, upon the FLRA's petition for enforcement, "of the proceeding and of the question determined therein," 5 U.S.C. § 7123(c). The District of Columbia Circuit has ruled that this provision permits a court considering the Authority's enforcement petition to review a respondent's otherwise available contentions despite the lack of a petition for review. *See FLRA* v. *United States Department of Commerce*, 962 F.2d 1055, 1057-59 (D.C. Cir. 1992). As the D.C. Circuit has noted, the FLRA's judicial review statute does not contain the language of other agencies' review provisions that specify that, in the absence of a timely petition for review, an agency order "'shall be conclusive in connection with any petition for enforcement which is filed'" by the agency. *See id.* at 1058 (quoting 29 U.S.C. § 660(b) (review provision for Occupational Safety and Health Commission)).

We therefore proceed to consider the merits.

III. Is Questioning by OIG Agents Subject to Section 7114(a)(2)(B)?

Section 7114(a)(2)(B) requires an opportunity for a union representative to be present at questioning of an employee by "a representative of the agency." The quoted words raise two issues: (a) what entity is the pertinent "agency" and (b) is an OIG agent a "representative" of the pertinent "agency?"

(a) *Which is the "agency"?* In the pending case, any one of four entities could arguably be the "agency" for purposes of section 7114(a)(2)(B)—the INS-NY (the immediate unit in which the interrogated employees work), the INS (the entity in which the INS-NY is located), the DOJ (the entity in which the INS is located), or the OIG (the entity whose agents conducted the interrogations).

The FLMRA defines "agency" to mean "an Executive agency," FLMRA § 7103(a)(3), with certain specified exceptions, among which are the Federal Bureau of Investigation, *id.* § 7103(a)(3)(B), and the Central Intelligence Agency, *id.* § 7103(a)(3)(C). Elsewhere in Title 5 of the United States Code, in which the FLMRA is located, "Executive agency" is defined to mean, for purposes of Title 5, "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105. The "Executive departments" are listed at 5 U.S.C. § 101. The list includes the Department of Justice, but not its constituent components. *Id.* The definition of "Government corporation," *id.* § 103, does not even arguably apply to any entity involved in this proceeding.

"Independent establishment" is defined, rather unhelpfully, to mean:

> (1) *an establishment* in the executive branch (other than the United States Postal Service or

> the Postal Rate Commission) *which is not an Executive department*, military department, Government corporation, *or part thereof*, or part of an independent establishment; and
>
> (2) the General Accounting Office.

Id. § 104 (emphasis added).

Whether this definition of "independent establishment" includes the OIG of a cabinet department is a matter on which three Circuits have divided. The District of Columbia Circuit has concluded that the OIG of the DOJ "plainly qualifies as an 'agency' because it is an 'independent establishment' and 'not an Executive department' (5 U.S.C. § 104(1))." *United States Department of Justice* v. *FLRA*, 39 F.3d 361, 365 (D.C. Cir. 1994) ("*DOJ/FLRA*"). The Third Circuit has interpreted the definition quite differently, reasoning that "'[i]ndependent establishments' are defined by 5 U.S.C. § 104 in such a way as to exclude any Executive departments *or parts thereof*." *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93, 98 (3d Cir. 1988) (emphasis added) ("*DCIS/FLRA*"). Based on this interpretation, the Third Circuit upheld the FLRA's view that the pertinent "agency" in a dispute similar to ours was the Department of Defense ("DOD"), and not the component of DOD where the investigated employee worked, the Defense Logistical Agency, nor, apparently, the component where the investigating employee worked, the Defense Criminal Investigative Service, a DOD subdivision under the authority of the OIG of the DOD. *See id.* The Eleventh Circuit has also held that the pertinent "agency" was the parent agency (NASA) in which the component that employed the interrogated employees was located. *See FLRA/NASA*, 120 F.3d at 1213.

On this aspect of the pending controversy, we agree with the Third and Eleventh Circuits. The definition of "independent establishment" excludes "parts" of an Executive department, 5 U.S.C. § 104(1), and the OIG of the DOJ therefore cannot be an "independent establishment," as the D.C. Circuit believed. Since the OIG is not an "independent establishment" and clearly not an Executive department or a Government corporation, it is not an Executive agency" and therefore not an "agency" within the meaning of the definition section of the FLMRA.

The DOJ contends that the "agency" within the meaning of section 7114(a)(2)(B) is "the agency or agency component that *engages in collective bargaining.*" Brief for Respondents at 19 (emphasis in original). Though the DOJ is certain that that entity is not the OIG, it is not clear as to whether it believes the pertinent entity is the INS-NY, the INS, or the DOJ. The collective bargaining agreement, which we asked the parties to make available to us, indicates that it was executed, on behalf of management, by the INS. The ALJ in the pending case (and the FLRA by adopting the ALJ's ruling) took the position that the "agency" for purposes of section 7114(a)(2)(B) is the parent entity in which the immediate unit employing the interrogated employees is located.[6]

[6]In seeking to enforce the FLRA's order in this Court, the Authority has advanced only its jurisdictional arguments and has refrained from expressing any view on the merits "at this time." *See* Reply Brief for Petitioner at 10. Our surprise at the DOJ's tactic of not pressing its position on the merits either by filing an objection to the ALJ's ruling before the FLRA or by filing a petition for review with this Court is matched by our surprise at the Authority's suggestion that, despite our request for briefing, it believes it will have some later time to present its views on the merits, even though we are considering its petition for enforcement of its order. In any event, after the filing of our initial opinion, the FLRA's petition for rehearing has fully informed us of its views on the merits.

See DOJ-INS-NY, 1996 WL 560250, at *8; *see also NASA*, 50 F.L.R.A. at 612. That parent entity in this case is the DOJ.

We agree with the Third and Eleventh Circuits that the pertinent agency for purposes of section 7114(a)(2)(B) is the department or parent agency employing the interrogated employees (here, the DOJ). *See DCIS/FLRA*, 855 F.2d at 98-100 (pertinent agency is Department of Defense); *FLRA/NASA*, 120 F.3d at 1213 (pertinent agency is NASA). That conclusion comports with the statutory definition of "agency."[7]

(b) *Is an OIG agent a "representative" of the agency?* The closer question is whether an OIG agent questioning employees of a bargaining unit located within the DOJ can be considered a "representative" of the DOJ for purposes of section 7114(a)(2)(B). The DOJ takes the position that since personnel of the OIG are within the category of employees who may not be included within an appropriate collective bargaining unit, *see* 5 U.S.C. § 7112(b)(7), "the only proper conclusion is that the OIG is not subject to the [FLMRA] *in any respect*," *see* Brief for Respondents at 14 (emphasis added), and therefore the requirements of section 7114(a)(2)(B) cannot be imposed upon OIG agents. We consider that argument flawed. Congress could well have decided that OIG agents should

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[7]To this extent, we disagree with the D.C. Circuit, which concluded that the DOJ was not the "agency" within the meaning of section 7114(a)(2)(B) because, in the case reviewed by that Court, the FLRA had dismissed the DOJ as a respondent on the ground that it was not responsible for the OIG's violation. *See DOJ/FLRA*, 39 F.3d at 365. The fact that the DOJ might not have acted in such a way as to be responsible for an unfair labor practice that the FLRA believed the OIG had committed is no indication that the DOJ is not the pertinent "agency" for purposes of determining whether an OIG agent is a "representative" of the "agency" within the meaning of section 7114(a)(2)(B).

not be included in bargaining units and yet also have decided that when OIG agents interrogate employees who enjoy the protections of the FLMRA in general and a collective bargaining agreement in particular, the interrogating agents must permit the attendance of a union representative.

The Third and Eleventh Circuits have ruled that an OIG agent employed by a cabinet department (DOJ) or an agency (NASA) is a "representative of the agency" within the meaning of section 7114(a)(2)(B). *See DCIS/FLRA*, 855 F.2d at 100; *FLRA/NASA*, 120 F.3d at 1213. The D.C. Circuit has ruled that section 7114(a)(2)(B) does not apply to interrogation by an OIG agent, *see DOJ/FLRA*, 39 F.3d at 364-68, a conclusion premised on that Circuit's view that only the OIG itself, rather than the parent cabinet department, might be the "agency" for purposes of section 7114(a)(2)(B), *id.* at 365.

In our view, determining whether an OIG agent is a "representative" of the DOJ for purposes of section 7114(a)(2)(B) requires some resolution of the tension between the FLMRA and the Inspector General Act of 1978, 5 U.S.C. app. 3 §§ 1-12 (1994) ("IGA"). A purpose of the FLMRA is to "prescribe certain rights and obligations of the employees of the Federal Government," 5 U.S.C. § 7101(b), and a purpose of the IGA is "to create independent and objective units . . . to conduct and supervise . . . investigations relating to the . . . operations of [federal entities including the DOJ]," 5 U.S.C. app. 3 § 2(1). Subjecting all OIG interrogations of federal employees to all aspects of FLMRA protections would risk impairing the "independent" investigations that OIGs were created to conduct. At the same time, we do not think Congress would have wanted the Weingarten protection of the FLMRA to be circumvented by a request from an agency head to have an OIG agent

conduct an interrogation of the sort normally handled by agency personnel, an interrogation beyond the scope of OIG functions.[8] We therefore conclude that whether an OIG agent is a "representative" of the DOJ for purposes of section 7114(a)(2)(B) depends on the context in which the interrogation arises. So long as the OIG agent is questioning an employee for bona fide purposes within the authority of the IGA and not merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibilities, the OIG agent is not a "representative" of the employee's agency for purposes of section 7114(a)(2)(B).

Just as an FBI agent questioning a DOJ employee concerning the employee's alleged criminal conduct would be a "representative" of the DOJ for some purposes, but not for the purposes of section 7114(a)(2)(B), an OIG agent, pursuing bona fide IGA functions, is similarly not limited by the *Weingarten* provision. Thus, we do not agree with the Third and Eleventh Circuits that section 7114(a)(2)(B) applies to questioning by an OIG agent simply because the inquiry concerns "possible misconduct" of employees "in connection with their work," *DCIS/FLRA*, 855 F.2d at 100, or because the information obtained might be used "to support administrative or disciplinary actions," *FLRA/NASA*, 120

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[8]The DOJ seeks to minimize the risk of such possible circumvention by pointing out that an agency could not *assign* an interrogation task to an OIG agent. *See* Respondent's Response to Petition for Rehearing at 10 ("Response"). Though the IGA prohibits "transfer" of "program operating responsibilities" by an agency head to an OIG, *see* 5 U.S.C. app. 3 § 9(a)(2), an agency head remains free to "request" an investigation, as the DOJ acknowledges, *see* Response at 10. However unlikely it might be, such request could provide an opportunity to overstep the legitimate purposes of the IGA and circumvent the *Weingarten* protection of the FLMRA.

F.3d at 1213. In *DCIS/FLRA*, the interrogated employees were suspected of shooting through the window of the home of a supervisor, *see DCIS/FLRA*, 855 F.2d at 95, and in *FLRA/NASA*, of planning violence against co-workers, *FLRA/NASA*, 120 F.3d at 1210.

The pending case involves interrogation about matters within the scope of bona fide functions of the IGA, and there is no indication that OIG agents were called in merely to conduct questioning normally undertaken by DOJ supervisory personnel. One set of employees was questioned about allegations of serious criminal offenses, including the acceptance of bribes. The other set of employees was questioned about violations of the INS District Director's policy prohibiting INS detention enforcement officers from purchasing or carrying personal firearms. We therefore conclude that section 7114(a)(2)(B) was inapplicable to the interrogation of any of the INS employees questioned in this case, and that none of the respondents committed a ULP.

In ruling that the applicability of section 7114(a)(2)(B) turns on the scope of the interrogation, we make no ruling as to whether OIG agents must specify in advance the subject matter of their interrogation. Our ruling means that the OIG agents disregard the *Weingarten* protections at their peril: if it is later determined that the inquiry concerned matters beyond the scope of IGA functions, the OIG risks a finding of an unfair labor practice and a possible prohibition against taking action against the employees on the basis of the interrogation.[9] In view of

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[9]One element of the FLRA's remedy order in this case is to prohibit the respondents from "tak[ing] disciplinary or other action against [the interrogated employees] as a result of any information acquired as a result of their examinations by agents of the Office of the Inspector General." *See DOJ-INS-NY*, 1996 WL 560250, at *9. We intimate no views on whether this provision would be valid in a case to which section 7114(a)(2)(B) applied.

the broad scope of IGA functions, however, the risk that questioning by an OIG agent without the presence of a union representative would violate section 7114(a)(2)(B) seems remote.

Conclusion

For these reasons, the FLRA's petition for enforcement is denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III

Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of June, one thousand nine hundred and ninety-eight.

Federal Labor Relations Authority,

Petitioner,

v. Docket No. 97-4001

U.S. Department of Justice, Washington, D.C., and U.S. Department of Justice, Immigration and Naturalization Service, New York, New York, and U.S. Department of Justice, Office of the Inspector General, Washington, D.C.,

Respondents.

A petition for rehearing containing a suggestion that the action be *reheard in banc* having been filed herein by the Petitioner *FLRA*, and the panel that heard the appeal having filed an Amended Opinion on *February 5, 1998*,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
George Lange III, Clerk
By:

Beth J. Meador,
Administrative Attorney

APPENDIX B

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.
(Respondent)

AND

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
NEW YORK DISTRICT
NEW YORK CITY, NEW YORK
(Respondent)

AND

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.
(Respondent)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES LOCAL 1917
AFL-CIO
(Charging Party)

BN-CA-50149
BN-CA-50156
BN-CA-50698
BN-CA-50700
BN-CA-50701

ORDER

July 30, 1996

The Administrative Law Judge issued his decision and order in this case on June 14, 1996, finding that the Respondents engaged in unfair labor practices and recommending remedial action.

No exceptions to the decision and order were filed with the Authority within the applicable time limit. 5 C.F.R. § 2423.26(c). Therefore, the findings, conclusions and recommendations of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, and decision and order of the Authority. 5 C.F.R. § 2423.29(a). All objections and exceptions are waived for all purposes.

Accordingly, the Respondents shall comply with the Judge's order.

For the Authority.

James H. Adams
Acting Director, Case Control Office

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C., Respondent

AND

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
NEW YORK DISTRICT
NEW YORK CITY, NEW YORK, Respondent

AND

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C., Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES LOCAL 1917
AFL-CIO, Charging Party

Case Nos.
BN-CA-50149
BN-CA-50156
BN-CA-50698
BN-CA-50700
BN-CA-50701

Scott D. Cooper, Esq., For Respondents

Ignatius A. Gentile, For Charging Party

Gary J. Lieberman, Esq., For the General Counsel of the FLRA

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, *et seq.* (Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA or Authority), 5 C.F.R. § 2411, *et seq.*

Based upon unfair labor practice charges filed by the American Federation of Government Employees, Local 1917, AFL-CIO (AFGE Local 1917 or Union), in Case Nos. BN-CA-50149, BN-CA-50156, BN-CA-50698, BN-CA-50700, and BN-CA-50701 against U.S. Department of Justice, Washington, D.C. (DOJ); U.S. Department of Justice, Immigration and Naturalization Service, New York District, New York, N.Y. (NY INS); and U.S. Department of Justice, Office of the Inspector General, Washington, D.C. (OIG),[1] a Consolidated Complaint and Notice of Hearing was issued in Case Nos. BN-CA-50149 and BN-CA-50156 and a Consolidated Complaint and Notice of Hearing was issued in Case Nos. BN-CA-50698, BN-CA-50700, and BN-CA-50701 on behalf of the General Counsel (GC) of the FLRA by the Acting Regional Director for the Boston Region of the FLRA and by the Regional Director for the Boston Region of the FLRA, respectively. The Respondents filed timely Answers to the Complaints denying they had violated the Statute. The Complaints were then consolidated by order of the Acting Regional Director of the Boston Region of the

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[1]The Respondents named in each separate charge will be set forth and discussed herein in *Discussion and Conclusions of Law.*

FLRA. The Consolidated Complaints allege that Respondents violated § 7116(a)(1) and (8) of the Statute by failing to comply with the provisions of § 7114(a)(2)(B) of the Statute by denying bargaining unit employees union representation at examinations in which they reasonably feared disciplinary action.

A hearing was held in this matter in New York City, New York. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondents and GC of the FLRA filed post hearing briefs which have been carefully considered.

Based upon the entire record[2], including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

A. Background

1. AFGE and INS.

The American Federation of Government Employees (AFGE) is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Immigration and Naturalization Service (INS), a component of DOJ. AFGE Local 1917 is an agent of AFGE for representing employees at INS, including NY INS' Immigration Inspectors at JFK International Airport, New York, and Detention Enforcement Officers at the Service Processing Center, 201 Varick Street, New

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[2]GC of the FLRA filed a Motion to Correct Transcript. No opposition to this Motion has been filed. Accordingly, the Motion, which is attached hereto as Attachment A, is GRANTED, and the requested corrections in the transcript are hereby made.

York. Ignatius Gentile is the President of the Union. Edward J. McElroy is the District Director for NY INS.

2. OIG Established by the Inspector General Act of 1978.

OIG, a component of DOJ, was established by Congress in 1978 with the enactment of the Inspector General Act, 5 U.S.C. app. §§ 1-12 (IG Act). In establishing the Office of Inspectors General for federal agencies, Congress sought "to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of . . . departments and agencies." S.Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 2676. In each specified governmental agency, the Office of the Inspector General was charged with the responsibility of conducting and supervising audits and civil and criminal investigations relating to the agency's operations, and to provide a means for keeping the head of the establishment and the Congress fully informed about problems and deficiencies of such programs. 5 U.S.C. app. §§ 2(1), (3) and 4(a)(1). The IG Act also provides that the Inspectors General are under the "general supervision" of the agency head, in this case, the head of the Department of Justice, the Attorney General. 5 U.S.C. app. § 3(a). However, under the IG Act "the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing subpena during the course of any audit or investigation." 5 U.S.C. app. § 3(a).

Howard L. Sribnick is the General Counsel of the Inspector General of DOJ. Sribnick is routinely advised by the Labor Management Relations Group of the Justice Management Division of the DOJ of the current status of the law including decisions by Federal Courts and the

Federal Labor Relations Authority and he advised OIG of the case law involving § 7114(a)(2)(B) of the Statute. There was no evidence presented at hearing that the head of DOJ, the Attorney General, had any role in advising OIG, nor was there any evidence that anyone at DOJ directed OIG to ensure compliance with the Statute.[3]

B. OIG Investigates Three Bargaining Unit Employees at JFK International Airport

The Immigration Inspectors employed by NY INS are responsible for enforcing the immigration laws of the United States, including determinations of the admissibility of arrivals at JFK International Airport (JFKIA). Henry H. Dang, Mike Lixandroiu and Jerry Pollatos are employed by NY INS as Immigration Inspectors assigned to JFKIA, and are in the Union's bargaining unit.[4]

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[3]Special Agent Grogan testified that if instructed, he would comply with an Attorney General direction for him to abide by an employee's section 7114(a)(2)(B) rights under the Statute. On further examination Special Agent Grogan testified his answer would be different assuming the Attorney General could not direct the OIG how to conduct an investigation.

[4]In November 1993, George Sorota, an Immigration Inspector for NY INS employed at JFKIA and a steward for the Union, was advised that he was the subject of an investigation by OIG. After learning of the investigation, Sorota spoke with Stephen Grogan, a Special Agent employed by OIG, at the office of OIG at JFKIA. Grogan informed Sorota that the source of the complaints that led to the investigation came from management at JFKIA (NY INS), but that he could not be specific in naming the source. Sorota was investigated by OIG about allegations that he was involved in espionage, and being a participant in a group termed the "night riders." The "night riders" were an alleged group of Immigration Inspectors that patrolled the streets on their off duty time actively searching for criminal activity in order to make arrests. Sorota was questioned by OIG on three separate occasions between November 1993 and March 1995.

In November 1994 and January 1995, Immigration Inspectors who worked at JFKIA, including, Inspectors Dang, Lixandroiu and Pollatos were interrogated by Special Agents of OIG. The investigations concerned Sorota, allegations about being involved with the "night riders", accepting of bribes from Chinese nationals, assisting family members in immigration matters, and misuse of INS's computer system. The January 1995 interrogations of Inspector Dang, Lixandroiu and Pollatos by OIG were of an administrative nature, since the U.S. Attorney's office had declined criminal prosecution. No administrative action has been taken against any of these employees.

1. The interrogation of Immigration Inspector Mike Lixandroiu.

Mike Lixandroiu has worked as an Immigration Inspector for NY INS for approximately 8½ years. On January 11, 1995, Lixandroiu was working the 10 a.m. to 6 p.m. shift in the Delta Terminal of JFKIA. An hour into the shift, Lixandroiu was given a direct order by Thomas Spellman, the Assistant Area Port Director of NY INS, to meet with agents of the OIG at 12 o'clock noon. At that point, Lixandroiu made his initial request for a Union representative, which was denied by Spellman. Subsequently, a fellow employee drove Lixandroiu in a government vehicle to OIG's office in Building 77, about a 5 to 10 minute drive from the JFKIA arrivals building.

Lixandroiu was ushered into an interrogation room furnished with a table and a two-way mirror. Two agents of OIG walked in and identified themselves with credentials. One of the agents was Grogan. Prior to questioning, Lixandroiu was informed by Grogan that the subject of the investigation was administrative in nature, involving the abuse of authority or misconduct. Grogan

informed Lixandroiu that following his investigation the report would forwarded to INS for any action to be taken. At that point, Lixandroiu requested a Union representative to be present at the interrogation. Agent Grogan denied Lixandroiu the right to have a Union representative present during the interrogation, and explained to him that he no longer possessed that right. After Grogan requested that Lixandroiu sign a form waiving his rights, Lixandroiu informed the agents that he did not wish to speak with them. Grogan advised Lixandroiu that he could leave the interrogation, but that the consequence of leaving the interrogation would be that he would be fired.

If an employee does not cooperate in an investigation by the Inspector General, the procedure is for the OIG agent to contact the employee's supervisor, in this case Lixandroiu's supervisor, a management official of NY INS, advise him or her that the employee is refusing to answer questions, and request that the supervisor direct that employee to answer the questions. The employee would be subject to discipline by the employee's agency, in this case, NY INS.

Following another request from Lixandroiu for a Union representative, and another denial, Grogan conducted the interrogation of Lixandroiu.

The interrogation of Lixandroiu lasted in excess of four hours, without any breaks or any water. At the end of the questioning, Lixandroiu was directed to sign notes that were taken during the interview by one of the Special Agents of OIG, and a waiver form. Lixandroiu refused to sign until he had a full understanding of what was taking place. After being sworn in, Lixandroiu made his last request to have a Union representative, to which the Special Agents informed him that he did not have any rights. Lixandroiu refused to sign the papers, and he was

brought back to his work site by another Immigration Inspector in a government vehicle.

Lixandroiu reasonably believed the examination by the OIG agents could result in disciplinary action against him.

2. The interrogation of Immigration Inspector Henry Dang.

Henry Dang has been an Immigration Inspector with NY INS since June 1989. On November 29, 1994, while working the 1300 to 2100 shift, Dang was ordered to the OIG office by Edward Hollis, the Area Assistant Port Director for NY INS. Dang, like Lixandroiu, was not informed why he was called in for questioning, but was concerned and requested that Hollis provide him with a Union representative. Hollis responded for Dang to go to the OIG's office, and make his request directly to the OIG agents. Dang was driven to the OIG office by another Immigration Inspector in a government vehicle.

Upon Dang's arrival to OIG's office, Grogan led him into an interrogation room where Special Agent Mark Kelly was present. Dang immediately asked Grogan whether he was the subject of the investigation, or a witness, to which the OIG agents replied that it depended on how he answered their questions. Dang requested to have his Union representative or an attorney present, to which the OIG agents replied that he did not have a right to representation due to a recent change in the law. Grogan warned Dang that if he did not cooperate fully with the investigation, he would be subject to termination. Dang was then asked to sign two waiver forms, which he maintains he signed under duress and with no knowledge of what he was signing. Dang was advised that they were also asking questions about Dang, and that it was strictly administrative, with no criminal charges against him.

After two or three hours of interrogation Dang was asked to sign a statement. Dang was driven back to the worksite in a government vehicle by a coworker.

On March 29, 1995, Dang received a letter from John Chase, Director, Office of Internal Audit, INS, dated February 9, 1995, that provided:

> An inquiry has been conducted concerning allegations that you forcefully took monies from Chinese nationals seeking asylum, and that you asked a Service employee to give your mother citizenship without taking the required test.
>
> We have closed the case and will not pursue the matter any further, unless new evidence comes to our attention.
>
> In accordance with Service policy, no record of this inquiry will be placed in your Official Personnel Folder.

Dang had a reasonable belief that the examination could result in disciplinary action against him.

3. The Interrogation of Immigration Inspector Jerry Pollatos.

Jerry Pollatos was questioned by Grogan of OIG on or about November 21, 1994. Pollatos had reasonable belief that the interview could result in disciplinary action. Pollatos requested Union representation and was denied union representation by Grogan.

C. OIG Investigates Three Bargaining Unit Employees at the Service Processing Center, 201 Varick Street, New York

The Service Processing Center at 201 Varick Street, New York (201 Varick Street) is a holding detention center for criminal aliens. Detention Enforcement

Officers, employed by NY INS, and assigned to 201 Varick Street, are responsible for the transportation and custody of criminal aliens from local jails and state facilities, and for the execution of arrest warrants and the deportation of criminal aliens. Sebastian Mason, Joseph Young, and Edgar Rances are employed by NY INS as Detention Enforcement Officers assigned 210 Varick Street, and are in the Union's bargaining unit.

McElroy, the District Director for NY INS maintains a policy that Detention Enforcement Officers can not purchase or carry personal firearms, and employees who have violated that policy in the past were terminated from employment by NY INS. In August 1995, Mason, Young and Rances were interrogated by Special Agents of OIG concerning ownership of personal firearms. No administrative action has been taken against any of these employees.

1. The investigation of Detention Officer Sebastian Mason.

In August 1995, Mason, while working at the Detention Center was given a direct order from his first line supervisor to meet with agents from OIG on the 6th floor of the Center.[5] The two individuals, one male and one female, identified themselves as agents of OIG. Although Mason was not informed what the investigation was about, he had a reasonable fear of discipline and requested to have a Union representative present during the questioning. The OIG agents responded that there was no need for a Union representative because it was an administrated matter and not a criminal matter.

The interrogation continued with an OIG agent writing

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[5]OIG does not maintain an office at the Detention Center, but was using office space from NY INS.

down the answers and, after the questioning was over, Mason was sworn in, and he signed a copy of the notes. The agents also informed Mason that NY INS initiated the investigation because inquiries were made by the District Director wanting to know why so many employees were violating his firearms policy. Finally, the OIG agents informed Mason that the information was being gathered to be reviewed by the District Director, who would make the determination if disciplinary action was warranted.

2. The investigation of Detection Office Joseph Young.

Young was questioned by agents of OIG during the same time period as Mason (August 1995), and over the same subject matters. Young was ordered by his first line supervisor to go to the 6th floor to meet with two agents from OIG. After identifying themselves the agents for OIG began asking Young questions about his knowledge of the District Director's firearms policy, and whether Young owned a firearm and where he kept it. After several questions Young requested a Union representative, to which the agents instructed Young to sit down and that he did not need a representative or a lawyer. At the end of the questioning, Young signed a statement and then was sworn in. Young was told by OIG's agents that the District Director for NY INS initiated the investigation, and it would be up to the District Director of NY INS to determine if there would be any disciplinary measures taken. Disciplinary action had not been taken against Young at the time of hearing.

3. The investigation of Detection Office Edgar Rances.

Edgar Rances was questioned by Agent Phil Turull and/or Agent Mary Chui by OIG on or about August 12, 1995. Rances had a reasonable belief that an interview

could result in disciplinary action, but was denied Union representation by OIG agents Turull and Chui.

Discussion and Conclusions of Law

A. Charges and Consolidated Complaints

In their brief Respondents renewed their motion that OIG be dismissed from Cases Nos. BN-CA-50149 and BN-CA-50698 because OIG was not mentioned in the charges. Respondents base this upon § 7118(a)(4) of the Statute, which provides that no complaint can be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority. Respondents argue that if a complaint can be issued against a party not named in the charge, §7118(a)(4) of the Statute would be rendered meaningless. I need not reach this argument because the Consolidated Complaints in this case are based on pairs or groups of charges. Thus while OIG was indeed not named in the charge filed in Case No. BN-CA-50149, OIG was named in the charge filed in Case No. BN-CA-50156. Both charges dealt with the same series of incidents and *both* charges were the basis for the Consolidated Complaint. The complaint, therefore was based upon a charge that named OIG. There is no requirement that every respondent be named in every charge upon which a complaint is issued. Rather, as was done here, each respondent was named in a separate charge that involved the same incidents. This is a reasonable approach to giving each respondent notice that it is the subject of an unfair labor practice allegation and the nature of the allegation.

Respondents also argue that NY INS should be dismissed from BN-CA-50156, BN-CA-50700 and BN-CA-50701 because it was not named in these individual charges. But INS was named in the charges in Case Nos.

BN-CA-50149 and BN-CA-50698, which, as discussed above were the basis of the Consolidated Complaints. Thus the Consolidated Complaints herein, insofar as they involve NY INS and OIG, are based on charges that named NY INS and OIG.

Accordingly Respondents' renewed motion is without merit and is denied.

B. Sections 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute

Section 7114(a)(2)(B) provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> * * *
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

Section 7116(a)(1) and (8) provides:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> * * *
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

C. The examinations

The record herein establishes that the six employees of NY INS, the three Immigration Inspectors at JFKIA and the three Detention Officers at the Detention Center, that are the subject of this proceeding were examined by OIG agents, were employees of NY INS and were members of the unit represented by AFGE Local 1917.

Further the record herein establishes that each of the six NY INS employees reasonably believed that his examination by OIG agents could result in disciplinary action and each requested of the OIG agents that the employee be permitted Union representation.[6] Each request for Union representation was denied by the OIG agents.

D. OIG and DOJ

The GC of the FLRA, relying on *Headquarters, National Aeronautics and Space Administration Center, Washington, D.C., and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C.*, 50 FLRA 601 (1995), *petition for enforcement* Case Nos. 95-6630 & 95-6690 (11th Cir.) (NASA); and *Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987) (*DOD, DCIS*), *enforced sub nom. Defense Criminal Investigative Service, enforced sub nom. Defense Criminal Investigative Service, Department of Defense* v. *FLRA*, 855 F.2d 93 (3rd Cir. 1988) (*DCIS*), that OIG was a representative of DOJ when it investigated the bargaining unit employees at

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[6]Certain of the NY INS employees also requested Union representation of the NY INS supervisor who told the employees of the OIG examination. The NY INS supervisor either denied the request or told the employees to make the request of the OIG agents.

JFKIA and Detention Center and both DOJ and OIG violated the Statute when the employees were denied their requests for union representation.

Respondents, relying primarily on *U.S. Department of Justice* v. *FLRA*, 39 F.3d 361 (D.C. Cir. 1994) (*USDOJ*) contend that OIG and DOJ did not violate the Statute. With respect to the position that DOJ can not be responsible for OIG conduct, Respondents also relys on *DOD, DCIS, DCIS* and *Nuclear Regulatory Commission, Washington, D.C.* v. *FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*).

With respect to the OIG, the Authority in *NASA* held that NASA-OIG investigator acted as a "representative of the agency"[7] within the meaning of § 7114(a)(2)(B). The Authority recognized that NASA-OIG is a separate investigative component of NASA-HQ, created by the IG Act, that operates through its own chain of command. In *NASA* the Authority, after a thorough analysis of the Statute, rejected the D.C. Circuit's position in *USDOJ*, and held that NASA-OIG is a "representative of the agency" within the meaning of § 7114(a)(2)(B). *NASA* at 612-620; *see also DCIS* and *DOD, DCIS.*

Accordingly, in the subjeet case I conclude that OIG is a representative of DOJ within the meaning of § 7114(a)(2)(B) and the six employees of NY INS, a component of DOJ, were entitled to have union representation at the examinations conducted by the OIG agents. The OIG agents' denials of the requested union representation interfered with the rights of unit employees at NY INS and violated § 7116(a)(1) and (8) of the Statute.

With respect to NASA-HQ, the parent organization in

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[7]The agency in *NASA* is NASA-HQ.

the *NASA* case, the Authority found that OIG represented "not only the interests of OIG, but ultimately NASA, HQ and its subcomponent offices." *Id.* at 621. The Authority, noting that the IG Act specifically provides that the IGs report to and are under the supervision of the head of the agency, found that NASA HQ was responsible for the statutory violations committed by its OIG. The Authority went on to state that NASA HQ was responsible "for the manner in which OIG conducts investigative interviews pursuant to section 7114(a)(2)(B) fully effectuates the purposes of the Statute." *Id.* at 621.

In light of the Authority decision and careful reasoning in *NASA*, I conclude DOJ was represented by and responsible for the manner in which OIG conducted the examinations in the subject case. *Id.* at 622. In the subject case the record fails to establish that DOJ advised OIG of the employees' rights under § 7114 (a)(2)(B) of the Statute or that OIG should grant the employees the right to union representation.[8] Accordingly, I conclude that DOJ was responsible for the conduct of OIG and, therefore, that DOJ violated § 7116(a)(1) and (8) of the Statute.

E. NY INS

NY INS, relying upon *DOD, DCIS*, argues that NY INS can not be held liable for the acts of the OIG because a component agency could not have influence on the OIG. The Authority affirmed the perceptive ALJ who stated that, "although DCIS and DLA are both parts of the DOD, I conclude DCIS is so independent of DLA and in fact so independent within DOD, that DCIS and its investigators are not agents or representatives of DLA." *Id.* at 1163.

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[8]Although OIG's General Counsel may have advised OIG of the status of the law, the record does not establish that anyone from DOJ or OIG instructed the OIG agents to grant INS employees their statutory rights.

The Authority noted that Defense Contract Administration Services Management Area summoning employees and providing rooms for DCIS was not sufficient to make it responsible for the DCIS conduct.

The record in the subject case, however, shows more involvement by the component agency in the OIG investigation. NY INS was an active participant in the OIG examination and, in fact played a pivotal role.

NY INS was not a mere bystander, or even a limited participant, to OIG's examinations of its employees. Thus NY INS initiated the OIG investigations of the three Detention Officers, NY INS instructed its employees to attend the OIG examinations, NY INS would receive the results of these OIG administrative investigations and decide upon the appropriate administrative action to be taken against its employees. Most important, if the employee refused to cooperate with the OIG examination, NY INS would, at the request of the OIG agent, order the employee to cooperate in the investigation or be disciplined by NY INS for failing to follow an order. Thus NY INS was the force that compelled its own employees to give up their statutory rights and participate in the OIG examinations.

NY INS did not tell employees that they could invoke their rights under § 7114(a)(2)(B) of the Statute and NY INS did not tell their employees that if the OIG did not let the employees exercise their statutory rights NY INS would not require the employees to cooperate with the OIG agents.

Accordingly, I conclude that *DOD, DCIS* is distinguishable and, in the subject situation, NY INS actively participated in denying their own employees their statutory rights, with respect to OIG examinations and that NY INS violated § 7116(a)(1) and (8) of the Statute. *Cf. U.S. Department of Labor, Mine Safety and*

Health Administration, 35 FLRA 790 (1990) (holding Mine Safety and Health Administration liable for the illegal actions of the Department's IG in a case where the IG was not charged).

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, U.S. Department of Justice, Washington, D.C.; U.S. Department of Justice, Immigration and Naturalization Service, New York District, New York City, New York; and U.S. Department of Justice, Office of the Inspector General, Washington, D.C., shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the U.S. Department of Justice, Immigration and Naturalization Service, New York District, New York City, New York, to take part in any examination conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the American Federation of Government Employees, Local 1917, AFL-CIO, or any other exclusive collective bargaining representative of the employee, to participate in such examination, when such representation has been requested by the employee.

(b) In any like or related manner, interfering with, restraining or coercing Immigration and Naturalization Service employees in their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) U.S. Department of Justice shall order U.S. Department of Justice, Office of the Inspector General to comply with the requirements of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of employees pursuant to that section of the Statute.

(b) U.S. Department of Justice, Office of the Inspector General shall comply with the requirements of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of employees pursuant to that section of the Statute.

(c) U.S. Department of Justice, Immigration and Naturalization Service will not instruct its employees to cooperate with the Office of the Inspector General if it fails to comply with the requirements of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of employees pursuant to that section of the Statute.

(d) Not take disciplinary or other action against Immigration and Naturalization Service employees Henry H. Dang, Mike Lixandroiu, Jerry Pollatos, Sebastian Mason, Joseph Young, and Edgar Rances as a result of any information acquired as a result of their examinations by agents of the Office of the Inspector General in November 1994, and January and August 1995, when these employees requested and were denied representation by American Federation of Government Employees, Local 1917, AFL-CIO.

(e) Post at the facilities of the New York District of the Immigration and Naturalization Service where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by U.S. Attorney General, by the Inspector General of the U.S. Department of Justice, and by the Director of the New York District, U.S.

Immigration and Naturalization Service, as appropriate and shall be posted for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Boston Region, in writing, within 30 days from the date of this order, as to what steps have been taken to comply.

Issued, Washington, DC, June 14, 1996

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations authority has found that U.S. Department of Justice, Washington, D.C., violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT require any bargaining unit employee of the U.S. Department of Justice, Immigration and Naturalization Service, New York District, New York City, New York, to take part in any examination conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the American Federation of Government Employees, Local 1917, AFL-CIO, or any other exclusive collective bargaining representative of the employee, to participate in such examination, when such representation has been requested by the employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL comply with the requirements of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of employees pursuant to that section of the Statute.

_____
(Activity)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with may of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Boston Region, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5743.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations authority has found that Immigration and Naturalization Service, New York District, New York City, New York, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT require any bargaining unit employee of ours to take part in any examination conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the American Federation of Government Employees, Local 1917, AFL-CIO, or any other exclusive collective bargaining representative of the employee, to participate in such examination, when such representation has been requested by the employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WILL NOT instruct our employees to cooperate with the Office of the Inspector General if it fails to comply with the regulations of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of employees pursuant to that section of the Statute.

WE WILL take no disciplinary or other action will be taken against INS employees Henry H. Dang, Mike Lixandroiu, Jerry Pollatos, Sebastian Mason, Joseph Young, and Edgar Rances as a result of any information acquired as a result of their examinations by agents of the Office of the Inspector General in November 1994, and

January and August 1995, when these employees requested and were denied representation by American Federation of Government Employees, Local 1917, AFL-CIO.

_____
(Activity)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with may of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Boston Region, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5743.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE
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The Federal Labor Relations authority has found that U.S. Department of Justice, Office of the Inspector General, Washington, D.C., violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT require any bargaining unit employee of the U.S. Department of Justice, Immigration and Naturalization Service, New York District, New York City, New York, to take part in any examination conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the American Federation of Government Employees, Local 1917, AFL-CIO, or any other exclusive collective bargaining representative of the employee, to participate in such examination, when such representation has been requested by the employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL order U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL to comply with the requirements of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of employees pursuant to that section of the Statute.

WE WILL NOT take disciplinary or other action against INS employees Henry H. Dang, Mike Lixandroiu, Jerry Pollatos, Sebastian Mason, Joseph Young, and Edgar Rances as a result of any information acquired as a result

of their examinations by agents of the Office of the Inspector General in November 1994, and January and August 1995, when these employees requested and were denied representation by American Federation of Government Employees, Local 1917, AFL-CIO.

_____
(Activity)

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with may of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Boston Region, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5743.

APPENDIX C

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996)

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7114. Representation rights and duties

* * * * * * *

(a)(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

* * * * * * *

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

* * * * * * *

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the

court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon

the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * * * *

FILED
NOV 20 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-667

In the Supreme Court of the United States

OCTOBER TERM, 1998

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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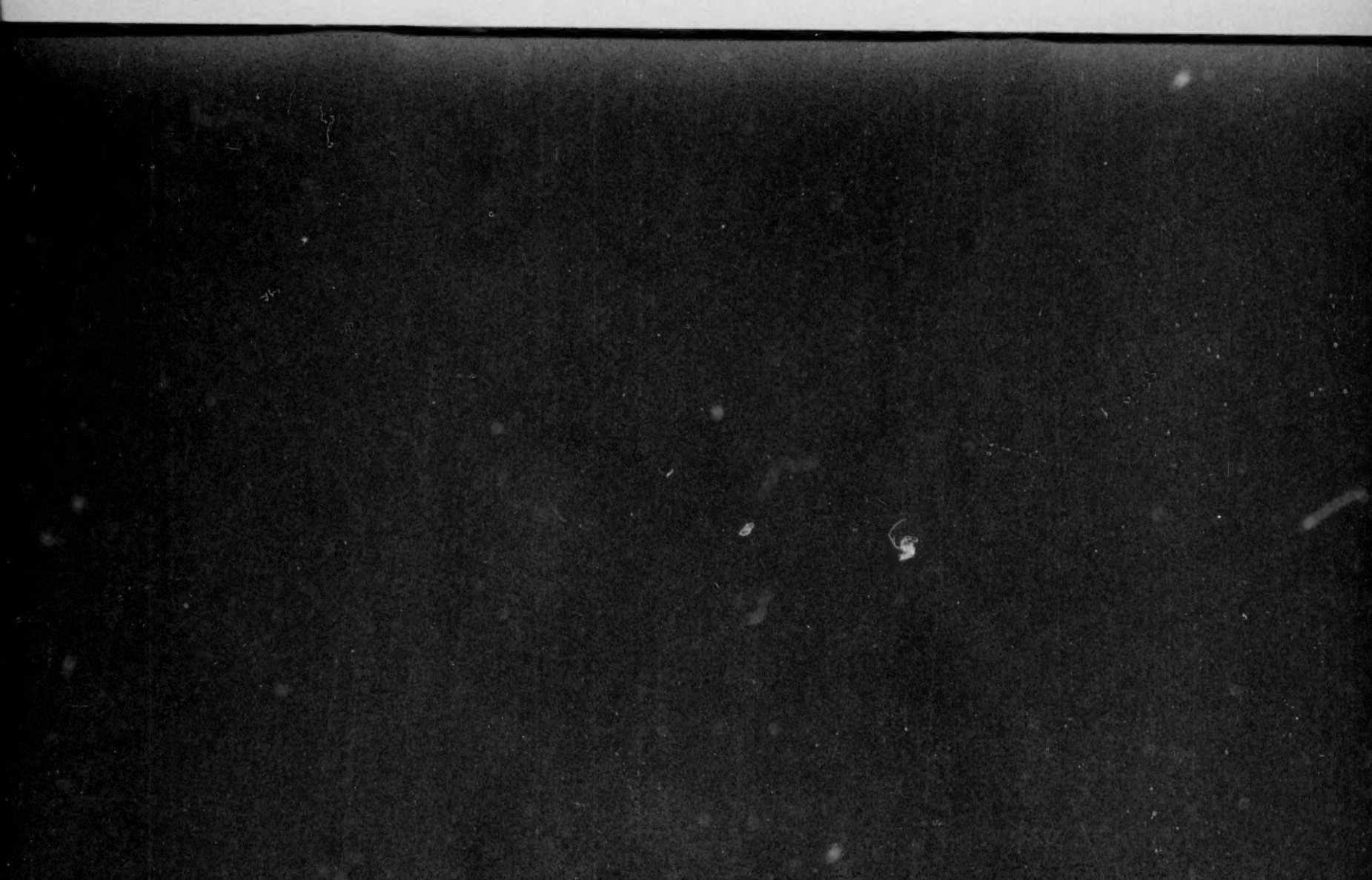

QUESTIONS PRESENTED

The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7114(a)(2)(B), gives a federal employee the right to the participation of a union representative at an interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action. The questions presented are:

1. Whether the "extraordinary circumstances" provision of 5 U.S.C. 7123(c) permitted the court of appeals to deny enforcement of an order of the Federal Labor Relations Authority (FLRA) applying 5 U.S.C. 7114(a)(2)(B) when the order had not been challenged before the FLRA.

2. Whether an investigator from the Office of Inspector General (OIG) is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B), notwithstanding the provisions of the Inspector General Act of 1978, 5 U.S.C. App. 3, §§ 1 *et seq.*, that insulate the OIG from agency control.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-667

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 137 F.3d 683, amending an opinion reported at 125 F.3d 106. The decision and order of the Federal Labor Relations Authority (Pet. App. 19a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals was originally entered on September 25, 1997. The opinion was modified on rehearing on February 5, 1998. A second petition for rehearing was denied on June 4, 1998. Pet. App. 17a-18a. On August 18, 1998, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to November 2, 1998, and the petition was

filed on October 22, 1998. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Service Labor-Management Relations Statute (FSLMRS or Statute), 5 U.S.C. 7101 *et seq.* (1994), provides generally for collective bargaining between federal agencies and the union representatives of their employees. 5 U.S.C. 7111-7114. The FSLMRS makes it an unfair labor practice for a federal agency to "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "otherwise fail or refuse to comply with any provision" of the FSLMRS. 5 U.S.C. 7116(a)(1) and (8).

The Statute provides that an "exclusive representative of an appropriate unit"—ordinarily a union—"shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2) (B). That provision is frequently referred to as the "*Weingarten*" provision of the FSLMRS, because it is similar to a right available to private sector employees recognized by this Court in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

2. In November 1994 and January 1995, three Immigration and Naturalization Service (INS) inspectors working at JFK International Airport were interrogated by special agents of the Office of the Inspector General, U.S. Department of Justice (OIG). Pet. App. 3a. The interrogations concerned, in part, allegations of involvement in espionage, participation in an alleged

group of INS inspectors termed the "night riders," and acceptance of bribes from Chinese nationals. *Id.* at 25a-26a. The "night riders" were alleged to be a group of immigration inspectors who patrolled the streets during their off duty time actively searching for criminal activity so that they could make arrests. *Id.* at 25a & n.4.

In August 1995, three INS detention officers working at a holding center for criminal aliens were also interrogated by OIG special agents. Those interviews focused on whether the officers had violated the INS District Director's policy prohibiting detention officers from purchasing or carrying personal firearms. Pet. App. 30a.

3. Some of the INS inspectors and detention officers requested union representation when directed by their INS supervisors to appear at the interviews conducted by the OIG agents. The OIG agents rejected those requests. Pet. App. 3a. The union representing those INS employees filed unfair labor practice charges with the FLRA, alleging that the OIG, DOJ, and New York office of the INS (INS-NY) had improperly prohibited the attendance of a union representative during questioning of employees. *Ibid.* In August and November 1995, the Boston region of the FLRA issued complaints and notices of hearing to the OIG, DOJ, and INS-NY. *Id.* at 41a-46a. After a consolidated hearing, an administrative law judge (ALJ) found that the OIG had committed an unfair labor practice by prohibiting the attendance of a union representative during the interrogations, that the DOJ had committed an unfair labor practice by failing to exercise its supervisory authority over the OIG, and that INS-NY had committed an unfair labor practice by failing to inform its employees that they could insist on the attendance of a union

representative. *Id.* at 3a. The ALJ recommended that the FLRA issue an order requiring the OIG, INS, and INS-NY to cease and desist from denying employees in INS-NY their right to have a union representative present during interrogations. The ALJ also recommended various affirmative actions and ordered that no disciplinary action could be taken against the six INS employees based on their interrogations by OIG agents in November 1994, and January and August 1995. *Id.* at 39a.

4. None of the three federal respondents filed exceptions with the FLRA to challenge the ALJ's order. Pet. App. 4a. On July 30, 1996, the FLRA issued an order adopting the findings, conclusions, decision, and order of the ALJ. *Id.* at 20a. More than five months later, the FLRA brought an enforcement proceeding in the court of appeals. The federal respondents filed an answer opposing the FLRA petition. *Id.* at 7a. After requesting and receiving briefs from the parties, the court of appeals denied enforcement. *Id.* at 4a, 16a.

5. The court of appeals ruled first that it had jurisdiction to decide whether to enforce the FLRA's order. The court noted (Pet. App. 6a) that the FSLMRS provides that, on appeals to courts from FLRA orders, "No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. 7123(c). The court explained that the FLRA had in earlier rulings come to the conclusion that 5 U.S.C. 7114(a)(2)(B) applies to questioning by OIG agents, based on the theory that OIG agents are "representatives of" the agencies to which they are assigned. Pet. App. 7a-8a. The court stated that, since that established rule had rendered futile any attempt to

persuade the FLRA to the contrary, the agencies' failure to file an objection before the Authority was "excused because of extraordinary circumstances." *Id.* at 6a-7a. The court also noted with approval a decision by the District of Columbia Circuit holding that a court considering an FLRA's petition for enforcement may review the contentions of a respondent who has not previously raised them in a petition for review. *Id.* at 8a (citing *FLRA* v. *United States Dep't of Commerce*, 962 F.2d 1055, 1057-1059 (D.C. Cir. 1992)).

On the merits of the case, the court recognized that 5 U.S.C. 7114(a)(2)(B) requires that a union representative have the opportunity to be at an investigative interview of an employee in the appropriate unit in an agency when that interview is conducted by "a representative of the agency." The court ruled, however, that an OIG agent, when questioning agency employees for bona fide purposes within the authority of the Inspector General Act of 1978 (Inspector General Act), 5 U.S.C. App. 3, §§ 1 *et seq.* (1994), is not "a representative" of the employee's agency for purposes of Section 7114(a)(2)(B). Pet. App. 14a. Since the court concluded that this case involved interrogations about matters within the scope of bona fide OIG functions under the Inspector General Act, the court concluded that none of the respondents had committed an unfair labor practice, and denied the FLRA's petition for enforcement. *Id.* at 16a.

DISCUSSION

The jurisdictional decision of the court of appeals is correct and does not conflict with the decisions of this Court or of any other court of appeals. The first question presented in the petition, therefore, does not warrant further review. The second question pre-

sented, whether an OIG investigator is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B), is currently before this Court in *National Aeronautics and Space Administration* v. *Federal Labor Relations Authority*, cert. granted, No. 98-369 (November 2, 1998). Accordingly, the petition should be held pending this Court's decision in *NASA*, and disposed of as appropriate in light of the resolution of that case.

1. The court of appeals held that it had jurisdiction under 5 U.S.C. 7123(c) to decide this case, because it concluded that the federal respondents were excused from objecting to the FLRA's order due to "extraordinary circumstances." The court followed circuit precedent in ruling that the "extraordinary circumstances" exception to Section 7123(c) excuses a litigant from presenting an issue to the FLRA if doing so would be futile. See *Overseas Education Ass'n (OEA)* v. *FLRA*, 961 F.2d 36, 38 (2d Cir. 1992) (When it is futile to challenge "deeply rooted and well-documented" FLRA precedent, the court will not require "the party to make hopeless arguments for no other purpose than to preserve them on appeal."). The court of appeals' continuing adherence to that interpretation of the "extraordinary circumstances" exception to 5 U.S.C. 7123(c) does not conflict with any decision of this Court or any other court of appeals.

Petitioner advances four reasons why the court of appeals should have required exhaustion of administrative remedies, but each is unpersuasive.

a. Petitioner contends that the FLRA's previously expressed view that an OIG agent is a "representative of the agency" within the meaning of Section 7114(a)(2)(B) was not, in fact, "deeply rooted and well-documented" under the *OEA* v. *FLRA* standard. Pet. 19.

The court of appeals held that the FLRA had left no doubt, in a July 1995 decision filed less than a year before the ALJ's ruling in this case, that OIG agents would be subject to the *Weingarten* provision of the FSLMRS. Pet. App. 7a-8a. See *Headquarters Nat'l Aeronautics & Space Admin.*, 50 F.L.R.A. 601 (1995), enforced, 120 F.3d 1208 (11th Cir. 1997), cert. granted, No. 98-369 (Nov. 2, 1998). In that case the FLRA noted that, "[t]he Authority has *long held* that an OIG investigator can, under certain circumstances, be a 'representative of the agency' within the meaning of section 7114(a)(2)(B) of the [FSLMRS]." 50 F.L.R.A. at 612 (citations omitted and emphasis added). The ALJ in the present case made its decision "[i]n light of" the Authority's decision in *NASA*. Pet. App. 36a. The court of appeals thus did not err in concluding that established FLRA precedent made filing exceptions to the ALJ's decision an exercise in futility.

Petitioner contends that FLRA precedent was not "deeply rooted and well-accepted" since the *NASA* decision "was only two years old" and a circuit split existed "regarding the application of section 7114(a)(2)(B) to OIG investigations." Pet. 17-18. But neither the circuit split nor the date of the *NASA* decision casts any doubt on the firmness of the Authority's position, because the Authority explained in *NASA* that it did not intend at that time to change its precedent. 50 F.L.R.A. at 612.[1]

b. The FLRA also argues that administrative exhaustion would not have been futile because it would

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[1] Nor has the Authority subsequently suggested any mechanism to reconsider its conclusion in this case. Instead, as the court noted, "the FLRA's petition for rehearing has fully informed [the court] of its views on the merits." Pet. App. 11a n.6.

have given the FLRA the opportunity to review two elements of this case that might have caused it to reach a contrary result. Pet. 17-19. But neither issue could in fact have changed the outcome. First, petitioner suggests that the "criminal" aspect of the allegations of this case might have led it to approve of the OIG conducting the interview outside the presence of the union representative. Pet. 18. Elsewhere, however, petitioner states that in its view the OIG investigation was not a "criminal" probe since the U.S. Attorney had declined criminal prosecution. Pet. 6. Moreover, the possible "criminal" aspect of the investigation was irrelevant to the court of appeals' decision, which upheld the exclusion of the union representative because the questioning was "bona fide" under the Inspector General Act. See Pet. App. 14a. Given petitioner's disagreement with that approach, the court below was correct to hold that any presentation of this case to the Authority would have been an exercise in futility.

Second, petitioner suggests that administrative exhaustion would not have been futile, because the Authority might have wished to consider whether the agency component, INS-NY, was liable in this case. Pet. 18-19. Petitioner argues that it had never before held a component agency liable for a Section 7114(a)(2)(B) violation by an OIG and that filing an exception with the Authority on that issue would not have been futile. The court of appeals, however, considered only the "contention that agents of the OIG are not 'representatives of the agency' within the meaning of section 7114(a)(2)(B)," Pet. App. 6a, and did not consider the liability of component agencies. Once it concluded that an unfair labor practice claim against the OIG was not justified, there was no basis for inquiring into the

possibility of holding responsible not only the OIG but also DOJ or INS-NY. Because the court of appeals did not reach that issue, the failure to present it to the FLRA was of no consequence.[2]

c. Petitioner also contends that the decision by the court of appeals cannot be reconciled with this Court's ruling in *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). Pet. 15-16. In that case the Court held that a court reviewing the action of the Interstate Commerce Commission should have refused to consider a technical error that had been raised for the first time in federal court and was "brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice." 344 U.S. at 36. But the reasons for requiring exhaustion in that case are not present here. In *L.A. Tucker*, the court was diverted from the merits by an unpreserved question of procedural law; here, by contrast, the court decided the merits of a question that was unpreserved only because it would have been futile to present the question to the Authority. Thus, "considerations of practical justice" (*ibid.*) required judicial review in this case.

d. Finally, petitioner argues (Pet. 19-21) that the court of appeals erred in holding in the alternative that it had jurisdiction pursuant to 5 U.S.C. 7123(c), which provides that when a party seeks review upon a petition for enforcement, "the court * * * shall have jurisdiction of the proceeding and of the question deter-

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[2] A similar issue, whether an agency headquarters commits an unfair labor practice by failing to require the OIG to comply with the *Weingarten* rule, is now before this Court in *NASA* v. *FLRA*, No. 98-369.

mined therein * * * and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority." The decision below is, as petitioner points out (Pet. 19), consistent with *FLRA* v. *Commerce*, in which the D.C. Circuit held that 5 U.S.C. 7123(c) allows a court of appeals to review the lawfulness of FLRA orders in an enforcement action brought by the Authority and to set them aside if they are contrary to law. 962 F.2d at 1058. That unremarkable conclusion in *FLRA* v. *Commerce* is, as the Second Circuit noted, directly applicable to the present case. Pet. App. 8a. Petitioner's efforts to re-argue the correctness of *FLRA* v. *Commerce* (Pet. 20 n.8) are misplaced, and petitioner can point to no conflict among the courts of appeals on that issue.

2. On the merits, this case presents the question whether an OIG investigator is a "representative of the agency" for purposes of the *Weingarten* rule, 5 U.S.C. 7114(a)(2)(B). That issue is before this Court in *NASA* v. *FLRA*, No. 98-369. As we have argued in that case, the better reading of the *Weingarten* provision in the FSLMRS, in conjunction with the Inspector General Act, is that an OIG investigator is not a representative of the agency for that purpose. Since the Court's resolution of *NASA* v. *FLRA* will likely be dispositive of the merits issue in this case, the petition should be held for *NASA* on that issue and disposed of in light of the decision in that case.

CONCLUSION

The petition for writ of certiorari should be denied as to the first issue. As to the second issue, the petition should be held pending this Court's decision in *NASA* v. *FLRA*, No. 98-369, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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No. 98-667

In the Supreme Court of the United States

OCTOBER TERM, 1998

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, D.C., U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, NEW YORK, AND DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, WASHINGTON, D.C.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-667

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

U. S. DEPARTMENT OF JUSTICE,
WASHINGTON, D.C.,
U. S. DEPARTMENT OF JUSTICE, IMMIGRATION
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INSPECTOR GENERAL, WASHINGTON, D.C.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Respondents, United States Department of Justice, the Department of Justice Office of the Inspector General, and the New York Immigration and Naturalization Service, argue that the first question presented, regarding the court of appeals' improper exercise of jurisdiction, does not warrant review by this Court because the court's jurisdictional decision is correct and does not conflict with the decisions of any courts. Resp. Br. 5. The Respondents also argue that

the second question presented, regarding the court of appeals' determination on the 5 U.S.C. 7114(a)(2)(B) issue, will "likely" be resolved by *NASA* v. *FLRA*, No. 98-369 (NASA), currently pending before this Court, and therefore the petition should be held pending the decision in that case. Resp. Br. 6, 10.

I. The Second Circuit Improperly Found Jurisdiction to Review the Merits of the Administrative Decision in This Case

Ignoring landmark precedent of this Court establishing the principles of administrative exhaustion and the proper role of reviewing courts vis-a-vis administrative agencies, the Respondents instead argue that their eschewing of exhaustion in this case is properly excused by the extraordinary circumstance of futility. As argued by the Federal Labor Relations Authority (Authority) in the petition for a writ of certiorari, the futility exception is not properly applicable in this case. Contrary to Respondents' argument (Resp. Br. 5), the Second Circuit's assumption of jurisdiction in this case conflicts with the decisions of this Court and those of other courts of appeals.

A. Futility Is Not Supported by Related Decisions of This or any Other Court

Section 7123(c) of the Federal Service Labor-Management Relations Statute (Statute)[1] provides that absent "extraordinary circumstances," a reviewing court shall not consider an "objection that has not been urged before the Authority." This administrative exhaustion requirement, found in various administrative agency

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[1]5 U.S.C. 7101-7135 (1994 & Supp. II 1996).

statutes,[2] has been interpreted to include circumstances where it would have been futile to raise the objection with the administrative agency. *See, e.g., National Labor Relations Board* v. *FLRA*, 2 F.3d 1190, 1195-96 (D.C. Cir. 1993) (The "patent futility" of urging an objection before the Authority may "constitute[] an extraordinary circumstance."). However, in recognizing that futility can be an extraordinary circumstance, courts have stressed it must be clearly and positively shown, *see Makar* v. *Health Care Corp. of Mid-Atlantic (Carefirst)*, 872 F.2d 80, 83 (4th Cir. 1989), and "should not lightly be presumed," *Washington Ass'n for Tel. and Children* v. *Federal Communications Comm'n*, 712 F.2d 677, 682 n.9 (D.C. Cir. 1983).

Here, the Second Circuit, relying on its *Overseas Education Association* v. *FLRA*, 961 F.2d 36, 38 (2d Cir. 1992) (*OEA*) decision,[3] found that it would have been futile for the Respondents to have filed exceptions with the Authority because the Authority had previously made clear its position that an Office of the Inspector General (OIG) investigator is a representative of the agency under 5 U.S.C. 7114(a)(2)(B). But in finding futility in this case, the Second Circuit has applied an analysis and reached a conclusion at variance with decisions of other circuits and this Court.

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[2]*See, e.g.*, 42 U.S.C. 1320a-7a (1994) (Social Security Act); 29 U.S.C. 660(a) (1994) (National Labor Relations Act); 30 U.S.C. 816(a)(1) (1994) (Federal Mine Safety & Health Act of 1977).

[3]In that case the Second Circuit applied the futility doctrine after concluding that the Authority had a "deeply rooted and well-documented" test for determining whether a bargaining proposal excessively interfered with the exercise of a management right. Although purporting to rely on its *OEA* precedent (Pet. App. 7a), the Second Circuit did not expressly find that the Authority's position was "deeply rooted and well-documented."

The Second Circuit ignores the fact that the futility exception is not "an excuse for failure to exhaust administrative remedies." *Health Equity Resources, Urbana, Inc.* v. *Sullivan*, 927 F.2d 963, 966 (7th Cir. 1991). Rather, the futility exception applies when "resort to administrative remedies is 'clearly useless.'" *Communications Workers of Am.* v. *AT & T*, 40 F.3d 426, 432 (D.C. Cir. 1994) (*CWA*) (quoting *Randolph-Sheppard Vendors of Am.* v. *Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986) (*Randolph-Sheppard*)). Because this exception is "'subject to abuse,'" *Randolph-Sheppard*, 795 F.2d at 105 (citation omitted), before a court reaches such a finding, the administrative agency must have both "evidenced a strong stand on the issue in question" and also shown "*an unwillingness* to reconsider the issue." *Id.* at 106 (emphasis added). Absent a "clear showing that an administrative agency has taken a hard and fast position that makes an adverse ruling a certainty," the exception does not apply. *Thetford Properties IV Limited Partnership* v. *U.S. Dep't of Hous. & Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990) (*Thetford*).

Asserting that there is no circuit conflict, the Respondents ignore the rigorous prerequisites necessary for application of the futility doctrine in every judicial circuit save the Second. Instead, the Respondents argue that the Second Circuit properly applied its own futility exception. Resp. Br. 6-7. However, the Second Circuit's application and the argument urged by Respondents "allow the futility exception to swallow the [administrative] exhaustion rule." *Thetford*, 907 F.2d at 450.

B. The Authority Had Not Indicated any Unwillingness to Consider Objections on This Question

The Second Circuit improperly concludes from the

Authority's clear articulation of its position on this issue that the Authority would be totally unreceptive even to the consideration of any objections. There is no support for this illogical assumption.

In the first place, though the Authority had long held that OIG personnel could be considered "representative[s] of the agency" within the meaning of section 7114 (a)(2)(B),[4] the Authority's position on this matter had recently been rejected by the United States Court of Appeals for the District of Columbia Circuit (*see United States Dep't of Justice* v. *FLRA*, 39 F.3d 361 (D.C. Cir. 1994)) causing the Authority to reevaluate its position on this question in *Headquarters, National Aeronautics & Space Administration, Washington, D.C. and National Aeronautics & Space Administration, Office of the Inspector General, Washington, D.C.*, 50 FLRA 601 (1995) (*Headquarters, NASA*). In that decision, the Authority reaffirmed that OIG personnel could properly be characterized as representatives of the agency, and went on to change course and conclude that the agency headquarters could be responsible for the statutory violations committed by their OIG personnel. *See Headquarters, NASA*, 50 FLRA at 620-21. This latter determination—holding the agency headquarters responsible for the violations of its OIG personnel—was applied for the first time in the case *sub judice*.[5] At the time of the Second Circuit's decision in this case, the Authority had not had even one opportunity to consider any objections to the agency headquarters determination reached in its *Headquarters, NASA* decision. From these facts the Second Circuit cannot properly conclude that it would have been futile for the Respondents to have filed objections with the Authority.

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[4]*See Department of Defense, Defense Criminal Investigative Serv.; Defense Logistics Agency and Defense Contract Admin. Servs. Region, New York*, 28 FLRA 1145 (1987), *enforced sub nom. Defense Criminal Investigative Serv.* v. *FLRA*, 855 F. 2d 93 (3d Cir. 1988).

[5]The Court has recently granted certiorari on this latter question as well. *See NASA*, 67 U.S.L.W. 3170 (U.S. Nov. 2, 1998) (No. 98-369).

In the second place, even if the Authority had a "predetermined policy" on this question, that would have been an insufficient justification for failure to exhaust administrative remedies. *See United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (*L.A. Tucker*). The Respondents attempt to distinguish this Court's *L.A. Tucker* decision by arguing that it dealt with an unpreserved question of procedural law, whereas the instant case concerns an unpreserved question on the merits. Resp. Br. 9. Contrary to Respondents' assertions, *L.A. Tucker* is clearly applicable to the case at hand. *See id.* at 37. Moreover, even if *L.A. Tucker* were distinguishable, the Respondents do not explain how the failure to preserve a question of procedural law, in that case, is not to be excused and denies a court jurisdiction, but ignoring all substantive and procedural prerequisites, in this case, is excusable and permits a court to exercise jurisdiction.

C. The Second Circuit's Finding of Futility Disregards Novel Issues in This Case that Had Never Been Presented to the Authority

Not only is the Second Circuit's futility standard unacceptably out of sync with decisions of this Court and those of other circuits, but the court below further erred by ignoring the fact that the Administrative Law Judge's decision under review in this case presented novel issues that had not been considered by the Authority. In its petition to the Court, the Authority pointed out these two novel issues—the criminal nature of the allegations in the case, a significant factor to the Second Circuit, and the finding of liability on the part of the local agency component. Pet. 18-19.

The Respondents argue that the novelty of these issues does not affect futility because neither of them

could have changed the outcome in this case. Resp. Br. 7-8. According to Respondents, the liability of the local agency component and the criminal aspect of the investigation were, in the final analysis, irrelevant to the Second Circuit's determinations in this case. As a threshold matter, the Respondents' arguments evince a failure to appreciate how the futility doctrine should be applied. Futility is not an after-the-fact, quality control device established for the purpose of evaluating whether a court's decision exceeded appropriate parameters in a given case. Rather, the futility doctrine operates to prevent a court from assuming jurisdiction except in cases where the agency's position is so entrenched that presenting arguments to the agency would be useless. *See CWA*, 40 F.3d at 432-33.

In this case, given the fact that neither of these issues had ever before been considered by the Authority, it is impossible to conclude that it would have been futile to administratively raise these questions. If proper procedures had been followed, the Authority would have been given the opportunity to evaluate and define whether, and under what circumstances, a local agency component may be liable when OIG personnel violate section 7114(a)(2)(B). Further, the Authority could have considered an issue specifically reserved in *Headquarters, NASA, i.e.*, how and when to apply the *Weingarten* right to interrogations conducted by agencies with government-wide, law enforcement responsibilities, such as the Department of Justice. 50 FLRA at 616 n.13. Moreover, the Respondents' contention that the criminal aspects of this investigation were "irrelevant" (Resp. Br. 8) is directly contradicted by the Second Circuit's express reliance on the fact that the employees were questioned about "serious criminal offenses." Pet. App. 15a.

D. Policy Considerations in This Case Strongly Militate for Exhaustion of Administrative Remedies

"In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992). The Second Circuit's decision reveals no such balancing of interests.[6] Instead, the agency in this case—the Department of Justice—either intentionally or inadvertently neglected to exhaust administrative remedies and, because of the Second Circuit's overly complacent application of the futility exception, was able to present objections to the court that neither it, nor any other litigant, had ever presented to the Authority. Aside from the Second Circuit's lenient approach to futility, the Respondents have offered no cogent practical or policy reason why well-recognized and long-established principles of administrative exhaustion, applicable to every other litigant in this country, should not be applied to the Department of Justice in this case.

The Second Circuit has essentially ruled that once an administrative agency has clearly decided an issue, even one about which several circuit courts of appeals are in active disagreement, aggrieved parties are relieved of

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[6]For example, nothing here suggests that "it would be unfair to penalize" a party for not exhausting administrative remedies because the party did not have adequate notice of the opportunity to pursue administrative remedies. *Bowen* v. *City of New York*, 476 U.S. 467, 482 (1986). Similarly, there is no countervailing interest to justify the court's finding of jurisdiction in this case, such as could occur in, for example, a criminal case in which "use of the exhaustion doctrine . . . can be exceedingly harsh." *McKart* v. *United States*, 395 U.S. 185, 197 (1969).

any statutory obligation to raise objections with the administrative agency. This rule applies even when the underlying decision implicates unique, subsidiary issues that the administrative agency has not addressed. Instead, aggrieved parties are entitled to ignore exhaustion procedures, refuse to comply with the administrative agency's order, and argue any objections they have with the agency's order in a court of appeals. On review of the merits of the agency's determination, that court of appeals may, *sua sponte*, establish its own interpretation of the agency's governing statute.[7]

Left undisturbed, the Second Circuit's decision establishes a dangerous precedent that will adversely affect other administrative agencies and the courts because it encourages the disregard of administrative exhaustion and the resolution of administrative disputes, in the first instance, by the federal courts.[8] The Second Circuit's decision is erroneous, has potential for a significant adverse impact, and is at odds with decisions of other courts of appeals and this Court. Certiorari is appropriate on this issue.

II. Comprehensive Resolution of the Issue of Whether an OIG Investigator Is a Representative of the Agency Is Essential

The goal of litigation of the second question presented in the Authority's petition is the comprehensive resolution of an issue of substantial importance to the

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[7]As noted in the petition, in this decision the Second Circuit established its own interpretation of section 7114(a)(2)(B) of the Authority's Statute and thus exceeded the judicial review authority provided in *Securities & Exchange Commission* v. *Chenery*, 332 U.S. 194, 196 (1947). Pet. 21-23.

[8]This adverse effect could be enormous with respect to large agencies having immense caseloads, such as the Social Security Administration (*see* note 2 *supra*).

federal labor-management relations community—whether an OIG agent is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B). In the Authority's view, and as discussed in the petition, there are issues raised in the Second Circuit's decision that a determination in *NASA* may leave unresolved. Pet. 25-26.

The Respondents request that the decision on this issue be held pending the Court's decision in *NASA*. Provided this issue is comprehensively resolved in *NASA*, the Authority interposes no objection to holding a determination on certiorari on this issue until after the Court has rendered a decision in *NASA*.

CONCLUSION

The petition for a writ of certiorari should be granted on the first question presented, and may be held on the second issue presented pending this Court's decision in *NASA*.[9]

Respectfully submitted,

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[9]The Solicitor General authorizes the filing of this Reply Memorandum by the Federal Labor Relations Authority.